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Supreme Court of the United States

OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC., ET AL., APPELLANTS,

vs.

JOSEPH A. SULLIVAN, ET AL.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

FILED MAY 14, 1962
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[fol. 1]

IN THE SUPERIOR COURT OF RHODE ISLAND

M. P. No. 5139

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY
OF WORLD LITERATURE, INC., Petitioners,

—against—

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY,
HOWARD C. OLSEN, DAVID A. COUGHLIN, JOSEPH
LEONELLI, OMER A. SUTHERLAND and RUTH THOMAS, in
Their Capacities as Members of the RHODE ISLAND COM-
MISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT
MCALOON in His Capacity as Executive Secretary of the
RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN
YOUTH, Respondents.

PETITION—Filed February 24, 1960

Bantam Books, Inc., Dell Publishing Company, Inc.,
Pocket Books, Inc., and The New American Library of
World Literature, Inc., all corporations organized and ex-
isting under and by virtue of the laws of the State of New
York, complain of Joseph A. Sullivan of the City of New-
port, County of Newport, State of Rhode Island, Abraham
Chill and Edward H. Flannery both of the City and County
of Providence, State of Rhode Island, Howard C. Olsen of
the City of Warwick, County of Kent, State of Rhode
Island, David A. Coughlin of the City of Pawtucket, County
of Providence, State of Rhode Island, Joseph Leonelli of
the City of Cranston, County of Providence, State of
[fol. 2] Rhode Island, Omer A. Sutherland of the City of
Woonsocket, County of Providence, State of Rhode Island
and Ruth Thomas of the City of Newport, County of New-
port, State of Rhode Island in Their Capacities as Mem-
bers of the Rhode Island Commission to Encourage Mor-
ality in Youth (sometimes known as the Rhode Island
Commission on Youth) and Albert McAloon of the City of

Newport, County of Newport, State of Rhode Island in his capacity as Executive Secretary of the Rhode Island Commission to Encourage Morality in Youth, and for cause of action say:

1. At all times herein mentioned petitioners were and are corporations organized and existing under and by virtue of the laws of the State of New York.
2. At all times herein mentioned petitioners were and are publishers of paper-bound books, fiction and nonfiction, most of which books were and are reprints of books theretofore published by various publishers in hard-bound editions, and which hard-bound editions had and have wide circulation throughout the country.
3. Petitioners have expended and continue to expend substantial sums of money in payment to publishers of hard-bound editions of books for the acquisition of the right to publish said books in paper-bound editions.
- [fol. 3] 4. Petitioners' books have been and are distributed in the State of Rhode Island through wholesale distributors who, in turn, sell said books to retail book sellers.
5. Respondents, with the exception of Albert McAloon, are the members of the Rhode Island Commission to Encourage Morality in Youth. Respondent Albert McAloon is the Executive Secretary of the said Rhode Island Commission to Encourage Morality in Youth. Said Commission was created pursuant to Resolution No. 73, passed at the January Session, 1956, at the Rhode Island General Assembly, and approved April 26, 1956. A copy of said Resolution is annexed hereto as Exhibit "A".
6. On May 25, 1959, the sixth paragraph of said Exhibit "A" was amended by S.444 of the Rhode Island General Assembly to read as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows, and to investi-

gate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

7. Any such "education" of the public by respondents concerning any book or publication whether by advice, information, list, notice or otherwise by the very language of said Resolution No. 73, as amended, constitutes an implicit threat that unless there is cessation of sale by wholesale distributors and retail book sellers of any such book or publication, the said wholesale distributors and retail book sellers will be prosecuted criminally.

8. Such threat results from the fact that, pursuant to the aforesaid Resolution No. 73, as amended, respondents are charged with the duty to "educate the public" concerning any "book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language" and such duty by the same Resolution, is implemented by the duty and power granted to said respondents to recommend the prosecution of the wholesale distributors and the retail booksellers for alleged violation of Chapter 11.31 of the General Laws of Rhode Island entitled "Obscene and Objectionable Publications and Shows", which, among other things, makes it a criminal offense for any person to import, print, publish, sell, lend, give away, advertise for sale, or distribute any "book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language".

9. By reason of such threat of prosecution implicit in any such "education" as hereinabove alleged, such "education" in whatsoever form would have and necessarily has the natural and inevitable effect of suppressing, or, at the [fol. 5] very least, of curtailing the distribution of any book, picture, pamphlet, ballad or printed paper concerning

which the respondents undertook to "educate", pursuant to the Resolution aforesaid, without any prior judicial determination within the State of Rhode Island, in accordance with due process of law, that such book or publication is obscene, and therefore, not within the protection of the First Amendment to the Constitution of the United States.

10. In purported compliance with the duty imposed upon them by said Resolution No. 73, as amended, "to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language"; respondents from time to time issued notices to wholesale distributors, of books in the State of Rhode Island and to retail book sellers, which said notices constituted threats that unless the wholesale distributors, and the retail book sellers would cease offering for sale the listed books and publications, respondents would exercise the duty and power granted to them under said Resolution No. 73, as amended, to recommend the prosecution of the wholesale distributors and the retail booksellers for alleged violation of Chapter 11-31 of the General Laws of Rhode Island, entitled "Obscene and Objectionable Publications and Shows", which, among other things, makes it a criminal offense for any person to import, print, publish, sell, lend, give away, advertise for sale, or distribute any "book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language".

[fol. 6] 11. By reason of such threats of prosecution as hereinabove alleged, one or more wholesalers, upon receipt of each of the said notices from respondents, immediately took off sale each of the books and publications listed in said notices, and sought the return from retail book sellers of copies of said books and publications that had been distributed prior to the receipt of said notices, thereby completely stopping in several of the cities and towns of the State of Rhode Island the distribution and sale of the books and publications listed in said notices.

12. Upon information and belief, respondents intend to continue in the future the practice hereinabove set forth of sending to the wholesale distributors of petitioners'

books in the State of Rhode Island and retail book sellers in said State, notices containing list of books concerning which the respondents undertake to "educate the public" pursuant to the said Resolution No. 73, as amended.

13. The effect of the sending by respondents to wholesale distributors and retail book sellers of notices, as hereinabove alleged, has had, and, upon information and belief, will continue to have the effect of preventing in the said several cities and towns in the State of Rhode Island, the distribution, display for sale and sale of the books and publications listed in said notices without any prior judicial determination within the State of Rhode Island, in accordance with due process of law, that the books and publications listed in said notices are obscene, and therefore, not within the protection of the First Amendment to the Constitution of the United States.

[fol. 7] 14. By reason of all of the foregoing, in the State of Rhode Island, petitioners have been and are being denied due process of law and have been and are being deprived of the equal protection of the laws and of the right of freedom of the press and including the right to publish and distribute books without prior restraint, and the investments of petitioners for acquisition of rights to publish their respective books and for the sale and distribution of said books have been and will continue to be illegally impaired, all in violation of the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island.

15. Petitioners have no adequate remedy at law.

16. To the extent that books published by petitioners have been or may be the subject of such "educating" of the public by respondents, petitioners are persons whose "rights *** are affected by a statute" within the purview of Section 2 of the Uniform Declaratory Judgments Act, P. L. 1959 C. 90, and this action is brought pursuant to the said Act for a judgment declaring that the aforesaid Resolution No. 73, as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the

Constitution of the United States and Article I, Section 20
of the Constitution of the State of Rhode Island.

[fol. 8] 17. Books published by some of the petitioners have been included in some of the notices heretofore promulgated by respondents. To the extent that books published by petitioners have been or may hereafter be included in the notices heretofore or hereafter promulgated by respondents, petitioners are persons whose "rights . . . are affected by a statute" within the purview of Section 2 of the Uniform Declaratory Judgments Act, P. L. 1959 C. 90, and this action is brought pursuant to said Act for a judgment declaring (1) that the aforesaid Resolution No. 73, as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island, and (2) that the acts and practices of respondents in purported performance of their duties as members of the Rhode Island Commission to Encourage Morality in Youth as hereinabove alleged have violated and violate the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island.

Wherefore, petitioners pray judgment as follows:

(A) Declaring that the said Resolution No. 73, as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island, and

•[fol. 9] (B) Declaring that the acts and practices of respondents in purported performance of their duties as members of the Rhode Island Commission to Encourage Morality in Youth, as hereinabove alleged, have violated and violate the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island, and enjoining and restraining respon-

dents, their agents, servants and employees from continuing said acts and

(C) For such other relief as this Honorable Court may deem necessary and appropriate.

May it please the Court to grant to the Petitioner's citations directed to the Respondents returnable on March 21, 1960 under a certain penalty therein to be specified, to appear before this Court to answer all and singular the premises, to stand, to perform and abide such other order and decree as to this Court shall seem meet.

By Their Attorneys,

Michaelson & Stanzler, by Milton Stanzler, 1009 Hospital Trust Building, Providence 3, Rhode Island;
Weil, Gotshal & Mangels, by Milton Stanzler, 60 East 42nd Street, New York 17, N. Y.

Let Citation issue returnable March 21, 1960.

Licht, J., 2/24/60.

[fol. 10]

EXHIBIT "A" TO PETITION

RHODE ISLAND

1102 JANUARY SESSION, 1956

No. 73

H 1000

Approved

April 26, 1956

RESOLUTION creating a commission to encourage morality in youth.

Resolved, That a commission be and it is hereby created, consisting of 9 members to be appointed by the governor, one of whom he shall designate as chairman.

Forthwith upon the passage of this resolution, the governor shall appoint 1 member to serve until the 1st day of March, 1957, 1 member to serve until the 1st day of March,

1958, 1 member to serve until the 1st day of March, 1959, and 1 member to serve until the 1st day of March, 1960, and 1 member to serve until the 1st day of March, 1961. During the month of February, 1957, and annually thereafter, the governor shall appoint a member to serve for a term of 5 years commencing with the 1st day of March then next ensuing and until his successor has been appointed and qualified to succeed the member whose term will then next expire.

Vacancies on said commission shall be filled for the unexpired term of the member or members being succeeded.

Any member shall be eligible to succeed himself.

Forthwith upon the passage of this resolution, the commission shall meet and organize.

[fol. 11] It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined in sections 13, 47, 48 and 49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections 13, 47, 48 and 49 of said chapter 610 as amended.

Said commission may employ such assistants, experts, and other personnel as may be necessary in the proper exercise of its duties hereunder.

The members of said commission shall serve without compensation but shall be allowed their necessary and travel expenses, and shall report annually during the month of January to the governor and the general assembly as to their activities and findings; and be it further

Resolved, That the general assembly shall annually appropriate such sum as may be necessary to carry out the purposes of this resolution; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon [fol. 12] receipt by him of proper vouchers duly authenticated; and be it further

Resolved, That for the purpose of carrying out the provisions of this resolution for the period ending June 30,

1957, the sum of \$10,000.00 be, and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated.

[File endorsement omitted]

[fol. 13]

IN THE SUPERIOR COURT OF RHODE ISLAND

[Title omitted]

RESPONDENTS' ANSWER—Filed April 6, 1960

The respondents now and at all times hereafter saving and reserving to themselves all manner of benefit or advantage of exception to the many errors, uncertainties and deficiencies in the Bill of Complaint therein contained, for answer thereto answering says:

1. Respondents admit the allegations contained in paragraph 1 of petitioners' Petition.
2. Respondents neither admit nor deny the allegations contained in paragraph 2 of Petitioners' Petition.
3. Respondents neither admit nor deny the allegations contained in paragraph 3 of Petitioners' Petition.
4. Respondents neither admit nor deny the allegations contained in paragraph 4 of Petitioners' Petition.
- [fol. 14] 5. Respondents admit the allegations contained in paragraph 5 of Petitioners' Petition.
6. Respondents admit the allegations contained in paragraph 6 of petitioners' Petition.
7. Respondents deny the allegations contained in paragraph 7 of Petitioners' Petition.

8. Respondents deny the allegations contained in paragraph 8 of Petitioners' Petition.

9. Respondents deny the allegations contained in paragraph 9 of Petitioners' Petition.

10. Respondents deny the allegations contained in paragraph 10 of Petitioners' Petition.

11. Respondents neither admit nor deny the allegations contained in paragraph 11 of Petitioners' Petition.

12. Respondents neither admit nor deny the allegations contained in paragraph 12 of Petitioners' Petition.

13. Respondents deny the allegations contained in paragraph 13 of Petitioners' Petition.

14. Respondents neither admit nor deny the allegations contained in paragraph 14 of Petitioners' Petition.

15. Respondents neither admit nor deny the allegations contained in paragraph 15 of Petitioners' Petition.

16. Respondents deny the allegations contained in paragraph 16 of Petitioners' Petition.

17. Respondents neither admit nor deny the allegations contained in paragraph 17 of Petitioners' Petition.

The Respondents deny that there is any other matter, cause or thing in the Petitioners' Petition contained therein or necessary for these Respondents to make answer to and [fol. 15] not sufficiently answered, confessed, traversed, avoided or denied; all of which matters and defenses the Respondents are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable charges and costs in this behalf most wrongfully sustained.

By Their Solicitor,

J. Joseph Nugent, Attorney General. By: Raymond J. Pettine, Assistant Attorney General.

[File endorsement omitted]

[fol. A]

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE SC.

SUPERIOR COURT

M.P. 5139

BANTAM BOOKS, INC. ET AL.,

vs.

JOSEPH A. SULLIVAN, ET AL.

**Transcript of Minutes Before Associate Justice
William M. Mackenzie, December 5, 1960**

[fol. B]

APPEARANCES:

For the Petitioner: Milton Stanzler, Esq., Horace Manges, Esq., from New York, Jack Raskin, Esq., from New York.

For the Respondent: Joseph L. Breen, Esq.

[fol. 2] The Court: Is this case here on its merits today?

Mr. Stanzler: Yes, it is Your Honor.

Mr. Manges: Does Your Honor wish a brief opening statement?

The Court: Yes.

OPENING STATEMENT BY MR. MANGES

Mr. Manges: This, Your Honor, is an action under the Uniform Declaratory Judgments Act, to declare as violative of the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Article 1, Section 20, of the Rhode Island Constitution, a resolution, No. 73, which was passed at the Janu-

ary, 1956 session of the General Assembly and approved thereafter by the Governor. It declares as unconstitutional under the same constitution and provisions thereof respectively, all the acts and practices of the Rhode Island Commission to Encourage Morality in Youth, also known as the Rhode Island Commission on Youth, in purported compliance with their duties under Resolution 73 as amended.

The basis of this action is brought by four publishers of paper bound books being distributed in the State of Rhode Island. These publishers being Bantam Books, Inc., Dell Publishing Company Inc., Pocket Books, Inc., and the New American Library of World Literature, Inc. [fol. 3] The basis of the claims of these plaintiffs is that there is a violation of their constitutional rights, and also of the book sellers and of the reading public, and this arises by reason of the following circumstances:

The determination of whether or not a publication is obscene within the definition of the United States Supreme Court as laid down in Roth vs. the U.S., decided in June, 1957, is in each case a constitutional question of law, because in each instance the question arises as to each publication. Should it be deprived of the constitutional guarantee of freedom of the press? The United States Supreme Court has held, as Your Honor knows, that obscenity, and obscenity alone, is not entitled to the guarantee of the freedom of the press in the subject of censorship, and to ascertain whether or not there is obscenity, there must be an adjudication of the Court, the decisions have so held, and that the Courts make such a decision. The cases hold furthermore, that due process of law must be accorded in each instance, and all the courts have gone so far as to say that [fol. 4] any law or any system that is devised where there is a decision as to obscenity without a court hearing, and without due process of law being accorded, such statute or such system will be struck down by the Courts.

Now here we have all the elements that are present when the Courts have stricken down such a system of extra legal censorship.

In the first place, Resolution 73, which creates the Rhode Island Commission on Youth, states that it is the duty of the respondent Commission to educate the public as to

what is obscene; and to make recommendations with respect to prosecution.

Now what do education and recommendation of prosecution mean? They mean, that unless all book-sellers take off sale that which the Commission has educated the public to be obscene, he has facing him and overhanging him the implied threat of prosecution.

Now there are any number of cases which we will cite before Your Honor, which hold that any implied threat of prosecution which results by reason of a body acting in [fol. 5] purported compliance with the censorship statute, the causing of such implied threats, the natural result of which is to send off sale, publications, is illegal.

The United States' Supreme Court has held in a very recent case of *Smith vs. California*, that any statute which tends to inhibit the circulation of publications is illegal, and certainly this system has the very proximate and natural result of suppressing or limiting the circulation of publications. The Courts hold in many instances that circulation of publication is entitled to the protection of the First Amendment, unless there is an adjudication of obscenity.

Now in this case in Rhode Island, caused by the Commission's acts, and caused by the education under the statute, there is no judicial determination of obscenity. The wholesalers and the retailers to whom this notice was sent, and the police, they are also sent to the police, know that when they have got this notice stating that by vote of the [fol. 6] Commission, the Commission took such a given publication to be objectionable for sale to youth under the age of 18, they know that unless they respond they will be tangling with the law, and the natural result is to let somebody else defend the Constitution of the United States. The easy way and the practical way to behave under the circumstances, especially due to the small profit involved in these publications, is to comply with the request, whether the request is right or not; and the request is never based upon a judicial standing.

The position of the publishers is, they deplore obscenity. If there is a judicial determination of obscenity by the Courts after affording of due process of law, they will

gladly comply with the law, but the result here of these notices being sent to wholesalers and to retailers, is to deprive, in addition, the entire adult population of Rhode Island from reading the books that this Commission thinks is unsuitable for those under 18. We contend that those under 18 have constitutional rights also, besides adults. In other words, a person 17 and a person 16 has just as much [fol. 7] constitutional right to be protected as a person over 18.

A person 17 or a person 16, ordinarily a college student, is deprived here of his right to read by reason of these acts, and to read what? Not a book which has been ~~pro-
per~~ ~~obscene~~ after applying the standards of the Supreme Court by a judicial tribunal, but what is usually handed down, a three to two determination on the part of the commission when there are but five there, and a five to four determination when this commission is up to its entirety of nine. Very frequently it is by a three to two vote. The notices show that the majority have so ruled. We don't know what standards have been applied, or whether it is due to caprice or anything else. So we say that the constitutional rights of the publishers and the book sellers and the reading public have all been invaded under the principles of the Supreme Court, the United States Supreme Court, by reason of first: The wording of the resolution, in using the word education, because you cannot educate ~~where com-
moned~~. If you brand what is obscene and what is not obscene, you are laying down a rule and a determination, [fol. 8] which is the function of the Court.

Finally, we say that in addition to the language of the resolution being unconstitutional on its face, these acts of the Commission in sending out these notices to wholesalers and retailers throughout the State of Rhode Island, stating that in their opinion the book is objectionable for sale to youth under 18 and that their cooperation is requested; the very words to the effect that the Attorney General is the enforcing officer in the event that compliance does not occur; that these notices are implied threats in connection with the acts that are overhanging them.

Now an excellent definition of the grave problems that are concerned here, are contained in a short sentence I

would like to read to Your Honor, as they sum up a very important argument. Two sentences which are contained in a well written article in the Providence Evening Bulletin for Tuesday, November 3, 1959, where the main editorial states:

[fol. 9] "Of greatest concern in the Commission's determined campaign to continue suppressing under the guise of 'voluntary cooperation', is its arrogation of the right to define, with the effectiveness of a court, just what is or is not obscene. It never has said how it arrives at its judgments, but it has not hesitated to enforce its judgments extra legally.

It is more than a little frightening that a Commission which was set up to encourage morality in youth, is setting youth an example by short cutting the law for its own purposes. Once vigilantism has been set loose in this State with the benevolent aid of law enforcement agencies, where will the process end?"

I just want to say that when we wrote the Commission before starting the law suit, asking them to stop this practice and setting ~~for~~ our authority and definitions of law—in fact setting forth the Commission's stand—they said they believed under the statute they had the right to educate, they were educating us on obscenity and they were going to continue to educate. That taking of books off sale was a voluntary act.

[fol. 10] Now you notice the newspaper rightly used "Voluntary cooperation", in quotation marks, because of course when these are taken off sale they are not really voluntary. In other words, if no statute, if no Commission, no police visitation—which we will show did frequently follow—there wouldn't be a taking off, but they say it is voluntary. They mean voluntary in the sense there is no prosecution that has taken place, ~~but~~ you don't need to have ~~the~~ prosecution as a fait accompli with it frightening the seller from taking the books off sale with fear of prosecution which is an implied threat.

We will show you a similar situation which took place in the Bantam Books against Melko in the State of New Jer-

sey, where the legal prosecutor sent out notice that the following books, he thought, were obscene, and their immediate cooperation was requested in taking them off; and then the prosecutor of the defendant said, "Well, when they were taken off sale it was just a voluntary act, nobody compelled them to". The Judge held that whether or not the defendants claim it was voluntary, obviously there was an implied threat; that the man was responding to an implied threat of prosecution and not doing it of his own accord.

[fol. 11] For all of these reasons this claim is based, and for these reasons I will ask a declaratory judgment in the form I have stated. I just want to say, that a motion was made by the defendant here to dismiss our petition on the ground of insufficiency in law; briefs were submitted, and as Your Honor will undoubtedly note from the file, that motion was denied.

With respect to the petition itself, I would just like to say that the answer admits three specific paragraphs of the petition, namely, paragraphs 1, 5 & 6.

JOEL KAPLAN Sworn.

Mr. Manges:

Direct examination.

1. Q. Where do you live Mr. Kaplan?
A. 174—10th Street, Providence.
2. Q. By whom are you employed?
A. Max Silverstein & Son.
3. Q. What is the address of that firm?
A. 2 Lancaster Street, Providence.
4. Q. In what business is it engaged?
A. We are publishers agents. We supply stores with periodicals.

[fol. 12] 5. Q. Is it also known as the business of being a wholesaler distributor of paper bound books and magazines?
A. We are a wholesaler distributor, that is correct.

6. Q. The firm has been acting in that capacity for several years?

A. Yes.

7. Q. What is the nature of your function there?

A. I am the manager of the magazine and book business.

8. Q. How long have you been so?

A. Approximately seven years I guess.

9. Q. In what territories does your firm distribute paper bound books and magazines?

A. Providence, Pawtucket, Warren, Bristol, East Providence, Wakefield, Narragansett, North Providence. I would say roughly it is 70 to 75 per cent of the State of Rhode Island.

10. Q. Does your firm distribute the paper bound books of Bantam Books, Dell Publishing Company, Pocket Books Inc., and the New American Library of World Literature?

A. Yes, we do.

11. Q. And the paper bound books and magazines of other publishers?

[fol. 13] A. Yes we do.

12. Q. Has it been doing so far, say at least back to 1955 and prior to that?

A. Oh yes.

13. Q. Continuously?

A. Oh yes.

14. Q. Is your firm the only wholesaler distributor of paper bound books and magazines in those territories to which you have adverted?

A. I would say yes, we are.

15. Q. Can you tell us who is the—

Mr. Breen: Sorry to interrupt you. Is he the sole distributor of paper bound books? Is he referring to publishing companies or in general?

Mr. Manges: The sole wholesale distributor in general.

Mr. Breen: Of all books?

Mr. Manges: The sole wholesaler.

The Witness: I would like to have you repeat that question again.

The Court: Certainly. Read the question please.
(Stenographer repeated the question.)

[fol. 14] A. No, I would have to change that, I would have to say no.

Mr. Breen: Just to get the record clear, I didn't think he meant it absolutely.

16. Q. Are you the sole wholesale distributor in those territories, of the paper bound books of Bantam Books, Inc., Dell Publishing, Inc., Pocket Books Inc., and the American Library of World Literature, Inc.?
A. Yes we are.

17. Q. Can you tell us who is the publisher of the paper bound edition of the book Peyton Place?
A. Dell Publishing Company.

18. Q. Can you tell us who the publisher is of the paper bound edition of the book entitled the Bramble Bush?
A. Bantam Publishing Company, or Bantam Books.

19. Q. Did your firm ever receive notices from the Rhode Island Commission on Youth?
A. Yes we did.

20. Q. Have you these notices with you pursuant to subpoena duces tecum heretofore served upon your firm?
A. I have these notices.

[fol. 15] 21. Q. Will you produce them please?
A. Yes.

Mr. Manges: I offer in evidence these papers produced from the witness's file. The first one being dated July 19, 1957, being a notice from the Rhode Island Commission on Youth addressed to Mr. Max Silverstein.

Mr. Breen: I object to this as irrelevant and immaterial to this, and I believe that the statute has been amended since the original notice, that date in 1957. This statute was amended in 1959, and I think in the pleadings here, the allegations are sounded on the statute as amended in 1959. This

goes away back in early origin, and its relevancy here I don't see. However I will abide by the Court's ruling. I suggest the Court be permitted to read it.

Mr. Manges: I don't think the amendment has any connection to the relevancy of this document. It is either relevant or irrelevant regardless of the amendment.

The Court: It would appear to the Court that it is relevant, and I will overrule your objection [fol. 16] Mr. Breen. The letter dated July 19, 1957 may be admitted into evidence and marked Petitioner's Exhibit 1.

(Letter of the Rhode Island Commission on Youth, to Mr. Max Silverstein, July 19, 1957, marked Petitioner's Exhibit 1)

Mr. Manges: I offer in evidence a notice of the Commission, dated August 5th, 1957, to Mr. Silverstein.

Mr. Breen: The same objection to the admission, that the subject matter in the letter is in no way relevant to the matters represented here and the companies represented by the petitioner.

Mr. Manges: This is offered on the issue of the general practice of the respondents Your Honor, the same practice as to all publications. As you see, we will have a long list.

The Court: In view of the fact that this particular letter concerning the publication is by persons other than the complainants, you feel that it is material to this and admissible?

Mr. Manges: I do, Your Honor, because it shows the general practice of the respondents in purported [fol. 17] compliance with the resolution. Now some of the notices along the same general line, will contain books that are published by the petitioners, but few of them, because thus far the two books that I have interrogated this witness about, namely, Peyton Place and the Bramble Bush, are the two publications which have been published by these

particular petitioners, but under the Declaratory Judgments Act, we say that aggrieved parties are those whose publications have been, or may be limited or suppressed as to circulation under the act. For this reason, among others, I think the general practice of the Commission is relevant.

The Court: In other words, although your petitioners were not injured in so far as this particular letter which was written, you maintain it has to do with a general course of conduct which is relevant to the issue?

Mr. Manges: Yes.

Mr. Breen: The letter may be admissible as a public document. They are an agency of the State, so it is my objection that this record will be highly complicated with matters that are not admissible [fol. 18] to the issue here involved. That would be the basis of the objection when introducing other publications. To run down the obscenity that we are concerned with, to bring the Court into this, I don't think it is necessary for an adjudication. However, the records of the agency are public records. I am not going to take any objection to that, except the relevancy to the instant matter. We could go into a whole trial on this.

Mr. Mangos: May I say this, that even if these two books had not been ~~entered~~ in the list, this action would have been brought by the petitioners. Two of the petitioners have not yet had their books on the list, but the danger is overhanging, that proposition is imminent. Under the facts they have the right to challenge the authority constitutionality-wise of any statute or method, even if these two books were not on the list. Certainly we shouldn't be deprived of making the complaint that the Commission is acting in violation of the Constitution of the United States and the Constitution of the State of Rhode Island.

The Court: I will overrule the objection. The letter dated August 5, 1957, may be introduced and marked Petitioner's Exhibit 2.

[fol. 19] (Letter Dated August 5, 1957, from Rhode Island Commission on Youth, to Mr. Max Silverstein, marked Petitioner's Exhibit Number 2)

Mr. Manges: I offer in evidence, letter dated October 8, 1957. The next one will be August 23, 1957, I would like to offer first.

The Court: The August 23, 1957 letter may be marked Petitioner's Exhibit 3, and the letter of October 8th—

Mr. Breen: May I have an exception?

The Court: Your objection may be overruled, and exception may be noted.

(Respondent's exception noted)

(Letter of August 23, 1957 from the Rhode Island Commission on Youth, to Max Silverstein marked Petitioner's Exhibit 3)

Mr. Manges: The October 8th I will offer later.

The Court: Very well, we will rule on that later.

Mr. Manges: I will offer in evidence the Commission notice dated September 25, 1957.

The Court: That may be marked Petitioner's Exhibit 4. How many of these letters do you have Mr. Manges?

[fol. 20] (Rhode Island Commission on Youth Notice, dated September 25, 1957, marked Petitioner's Exhibit 4)

Mr. Manges: I think I have probably 25 or 30 Your Honor.

The Court: Are they going to be referred to separately, or would there be any objection to grouping them as one exhibit?

Mr. Manges: They are all different subjects; I think it would be easier for the Court. All of a similar type could be offered possibly, together as one exhibit, but I don't know if we would gain anything. I will do exactly as Your Honor wishes.

The Court: Perhaps it would be best to continue in the usual manner and number them chronologi-

eally. However, you might show them all at one time to Mr. Breen.

Mr. Manges: Yes. I offer the Commission's notice dated October 8th, 1957.

The Court: That may be marked Petitioner's Exhibit 5.

(Commission's Notice Dated October 8th, 1957, marked Petitioner's Exhibit 5)

Mr. Manges: I offer in evidence the Commission's [fol. 21] notice, dated October 15th, 1957, dealing with the book Peyton Place.

The Court: The notice, October 15, 1957, referring to Peyton Place may be marked Petitioner's Exhibit 6.

(Commission's Notice October 15, 1957, Referring to Peyton Place marked Petitioner's Exhibit 6)

Mr. Manges: I offer the Commissioner's Notice, dated November 6th, 1957.

The Court: Commissioner's Notice dated November 6th, 1957; that will be Petitioner's Exhibit 7.

(Commissioner's Notice Dated November 6th, 1957, Petitioner's Exhibit 7)

Mr. Manges: I offer the Commissioner's Notice of November 19th, 1957.

The Court: Petitioner's Exhibit 8.

(Commissioner's Notice of November 19th, 1957, Marked Petitioner's Exhibit 8)

Mr. Manges: I offer in evidence the Commissioner's undated letter, notice, commencing with the words: "Vendors of literature, distributors and retailers".

Mr. Breen: May I have a moment please.

The Court: Yes.

[fol. 22] The Court: That may be marked Petitioner's Exhibit 9.

(Commissioner's Undated Letter, Notice, Commencing with the Words: "Vendors of Literature,

Distributors and Retailers, Marked Petitioner's Exhibit 9)

Mr. Manges: I will now offer eleven of these as one exhibit, dated respectively, December 2nd, 1957, December 17th, 1957; December 27th, 1957, January 20th, 1958, January 31, 1958, February 21, 1958, March 14th, 1958, April 7, 1958, June 24, 1958, July 3rd, 1958 and July 28th, 1958.

The Court: The letters from December 2, 1957, to July 28th, 1958, may be introduced and marked collectively as Petitioner's Exhibit 10:

(Commission's Letters from December 2, 1957, to July 28th, 1958, Marked Collectively as Petitioner's Exhibit 10)

Mr. Manges: I offer the Commissioner's undated notice to All Retailers of Publications in the State of Rhode Island, starting "Gentlemen: The Rhode Island Commission on Youth, unanimously established—" etc. With attachments.

Mr. Breen: Part of the attachments are on the law alone. I object to that, but I will get the exception in the record to this papers. Go ahead.

[fol:23] The Court: The undated letter referred to with the attachments, may be introduced and marked Petitioner's Exhibit Number 11. Exception is noted.

Undated Notice of the Commissioner's, to All Retailers of Publications in the State of Rhode Island Starting "Gentlemen: The Rhode Island Commission on Youth, Unanimously established—" etc. Marked Petitioner's Exhibit 11)

(Respondent's Exception Noted)

Mr. Manges: May I read a sentence to Your Honor at this time:

"Your cooperation in removing the listed and other, objectionable publications from your newsstands will be appreciated. Cooperative action will eliminate the necessity of our recommending pros-

ecution to the Attorney General's department." Signed by the Chairman of the Commission.

I now offer in evidence, 11 additional notices of the Commission as one exhibit. Those being dated respectively, September 11th, 1958, October 22nd, 1958, November 20th, 1958, December 4th, 1958, and the following in 1959, in January 14th, February 16th, July 2nd, July 21st, October 9th, October 27th, December 30th.

[fol. 24] The Court: Those eleven letters may be introduced and marked Petitioner's Exhibit 12.

(Eleven Letters Dated from September 11th, 1958 to December 30th, Marked Petitioner's Exhibit 12)

Mr. Manges: I offer in evidence the commission's report dated August 10th, 1959.

The Court: That may be marked Petitioner's Exhibit 13.

(Commission's Report Dated August 10th, 1959, Marked Petitioner's Exhibit 13)

Mr. Manges: I offer in evidence the Commission's undated notice referring to the Bramble Bush, by Charles Mergendahl.

Mr. Breen: May I have a minute please.

The Court: That may be marked Petitioner's Exhibit 14.

(Commission's Undated Notice Referring to the Bramble Bush by Charles Mergendahl, Marked Petitioner's Exhibit 14)

Mr. Manges: I offer in evidence as one exhibit, Two Commission's notices, one dated August 30, 1957, and the other, February 18th, 1960.

The Court: They may be marked together as Petitioner's Exhibit 15.

(Two Commission Notices one Dated Aug. 30, 1957 and one Feb. 18th, 1960 Marked Petitioner's Exhibit 15)

[fol. 25] Mr. Manges: I offer in evidence, undated News Letter of the Commission. I would have no objection to the date being supplied to any of the undated documents.

The Court: May be marked Petitioner's Exhibit 16.

(Undated News Letter of the Commission marked Petitioner's Exhibit 16.)

22. Q. Mr. Kaplan, when your firm—

The Court: I just wanted to say, to let the record show that Mr. Breen's objection has been made to the introduction of all of these various exhibits, and the objection has been overruled, and the respondent's exception has been noted.

(Respondent's exception noted.)

23. Q. When your firm received these notices that have been admitted in evidence, stating in effect that the Rhode Island Commission on Youth had found specific publications objectionable for sale to Youth under 18, what if anything did your firm do?

A. Our policy was that we would send people that worked in the organization out to the news stands and withdraw the magazines or books from the [fol. 26] news stands, and at that time we would cease selling them, and if we had any orders we wouldn't fill the orders.

24. Q. In other words, three things would take place. You would accept no more orders?

A. That is correct.

25. Q. You would do no more direct selling yourself?

A. That is correct.

26. Q. And you would recall the publications from your customers, that is the retailers; is that right?

A. Yes, that is right.

27. Q. Now why did your firm take such action Mr. Kaplan?

A. Well, we felt that rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply, we felt that

in the best interest we would call the merchandise off sale.

28. Q. And do the other acts which you have referred to?

A. That is right.

29. Q. After you received each of these notices of the nature which I have just described, did your firm receive any visits from any member of the Providence Police Department?

A. Well, we did receive visits from the Providence Police Department.

30. Q. Do you recall who in particular visited you?

[fol. 27] Mr. Breen: I will assume you are going to show he received visits in connection with this business. The record isn't going to show that now.

31. Q. Will you tell us about the visits and what they were connected with?

A. Well, we did have visits from Lieutenant Blessing, who is now deceased, regarding these matters of these magazines and books that we would take off sale.

32. Q. Did he ask you what books you had taken off sale?

A. Usually what happened is, after we received a letter from the Commission, we would receive a telephone call from the Police Department asking us what action we had taken. Usually the call would come in in a week or ten days after we received the letter, and at that time I would tell Lieutenant Blessing that we had called the book off or the magazine, off the stand. At that time he would ask me how many copies it involved, how many copies we received from our National Distributor, how many copies we picked up from the stand and how many copies we were going to return to the publishers.

[fol. 28] 33. Q. And in connection with the notices that have been marked in evidence, I notice there are pencil notes on many of them with respect to figures where there are requests made to take off sale. Would you explain to His Honor what those figures meant?

Mr. Breen: I ask that the witness be furnished with that exhibit.

The Court: Would this be a convenient place to take a five minute recess?

Mr. Manges: Yes. This would be the last question of this witness.

The Court: We will take a five minute recess at any rate.

Recess.

Direct examination (continuing)

By Mr. Manges:

34. Q. Mr. Kaplan, I show you Petitioner's Exhibit 7, being Commission's letter, dated November 6, 1957, and I call your attention to certain pencil notations including the word "draw" with figures, next to the respective books, and then on the other side pencil notes with the word "Returns", and a column of figures directly under. Will you explain to His Honor just what you meant by those pencil notes?

[fol. 29] A. Well, usually the—

35. Q. First of all, what is the "draw", that is on here in pencil?

A. The "draw" means what the publisher of that particular item sent us, so many copies; that is the figure on the left. As I said, usually the police would call and ask what we had, and ask for the figure. I would tell them we drew 800 copies. You see amount drawn, and I indicate copies we returned to the publisher. After they picked them up from the stand sent back to the publisher.

36. Q. At the time the notice reached your firm a certain part of the draw may have been sold?

A. The draw had been distributed to the stores, then we picked it up from the stores.

37. Q. The retailer may have sold part of the allotment?

A. That is correct.

38. Q. The figure on the right shows the amount of copies

that were returned as a result of the Commission's notice?

A. That is correct, it would.

[fol. 30] Q. As a result of your action immediately following the Commission's notice?

A. Right.

Mr. Manges: That is all.

Cross examination.

By Mr. Breen:

40. Q. On this exhibit Number 7, I believe you testified that this number on the right reflected the number of all copies or issues returned, is that right?

A. Yes.

41. Q. You have no way of knowing why they were returned have you?

A. Well, depending on—I don't know if going to answer your question correctly—depending on, for example—these happen to be magazines. If a notice had been received by us, say a week after our magazine had been placed on sale, our pick ups and returns to the publisher would be much higher than usual. Is that your question?

42. Q. But there are returns made without any reference to that matter whatsoever. The retailers would return these books to you without any reference?

[fol. 31] A. All unsold copies would be returned to the publisher, but in this instance these would be returned because of our action.

43. Q. At the same time, November 6th, there were others returned to you, to your company without reference to this notice?

A. These are copies that we returned from the stores themselves, we picked up ourselves.

44. Q. At the same time would pick up your books whether or not referred to by the Commission?

A. We do pick up returns every week.

45. Q. But actually this is merely a recapitulation of books returned, whether or not there has been notice?

A. No, I cannot say that. These books were actually picked up at our request. Our policy is to pick up these books because of the notice. For example, one of those books would normally be on sale, or magazine would be on sale for, maybe, another three weeks or so, so we picked them up in advance of the calling date.

[fol. 32] 46. Q. You mentioned Lieutenant George Blessing, do you know what his office is with the Province Police?

A. He is dead.

47. Q. Was?

A. I understand that his position was listed as Amusement Officer. I think he had dealings with movies that were shown as well as books and magazines.

48. Q. And his predecessor was Captain Curran?

A. I don't know. I don't know.

Mr. Breen: I want to object. That is seven years ago.

A. No, I have been working there about 25 years, but as manager, about seven years.

49. Q. And when you went to work wasn't Lieutenant Blessing calling on the company at that time?

A. I didn't get the question.

50. Q. Didn't Lieutenant Blessing make an inspection of your publications when you first went to work with the company as manager, didn't Lieutenant Blessing or his predecessor make periodical inspections of your publishing premises.

A. I don't know. I didn't know Lieutenant Blessing until I became manager.

51. Q. When you did become manager, wasn't it common company practice for the Lieutenant to make the rounds make an inspection of your premises?

A. I can't answer. I don't know if he did or not.

[fol. 33] 52. Q. Now in 1956, with this resolution, the act of this Commission, did you attend a conference with the Commission?

A. There were occasions where there were meetings that my company was invited to, and on certain occasions I attended.

53. Q. And on these occasions, these conferences, were the functions or duties of the Commission explained?

A. I don't know if they were explained or not. There were certain items brought up, I don't recall.

54. Q. The item of conversation, of discussion, the function and the objective of the Commission, was that discussed?

Mr. Manges: I object to any such discussion. The Complainant certainly was not bound by any discussion that was between the Commission and the other people.

The Court: I will sustain the objection to the question and note your exception Mr. Breen.

(Petitioner's exception noted.)

55. Q. In the meeting, for example, December 1st, 1957, did you attend a meeting of the Youth Commission at their office in the Old Industrial Trust Building?

A. I don't know.

[fol. 34] 56. Q. If the minutes of the meeting included your name?

A. Yes, that is right.

57. Q. In the agenda of that meeting, did you and your company and other publishers, other distributors, express their views with respect to the operation of the Commission?

Mr. Manges: I object to this line of questioning on the ground that it is not what took place. What took place is not binding upon the plaintiffs. Furthermore, that the Commission must be judged by its acts which affected the plaintiff's rights, but not by any discussions or conferences that it may have had.

The Court: Do you have anything to say to that?

Mr. Breen: With reference to the act of the Commission, and the acts of the Publishers, the removal of the books, I think we should be allowed to show that it was actually voluntary. That these publishers in these meetings agreed to cooperate with the Commission.

Mr. Manges: May I be heard on that.

Mr. Breen: He claims it is irrelevant. In any event, whether they do or not, I think we should be able to show on the record that the publishers [fol. 35] did voluntarily cooperate with the Commission, and that was the purpose of that question.

Mr. Manges: A similar defense was offered in connection with actions of Detroit Police Commission when we obtained an injunction against him on behalf of Random House Inc. and Bantam Books, and it was claimed that the whole method of the so-called voluntary censorship, was induced by the act of the distributors who wanted peace of mind, and they asked for it—that is obviously what the defense is trying to show—and the Court, I think very properly, held that this was absolutely irrelevant. The question is basically: Are the acts of the respondents legal or illegal? The fact that anybody asked them to conduct illegal acts even, would not condone them.

Here is a statutory Commission which is empowered to do something; it is set up by resolution of the General Assembly. There are two questions that are relevant here: Is the resolution, the statute, constitutional on its face? Second: Were acts committed by the respondents in purported compliance with their duty, legal or illegal?

[fol. 36] Now the fact that the distributors thought this would be a nice thing, that this would create peace of mind on their part, hasn't anything to do with it at all, and the Detroit Court in Detroit, ruled that whether or not the distributors were pleased by it, or whether it gave them peace of mind, had nothing to do with the issue.

I respectfully submit, it is exactly the same here in this particular case. The Commission itself stated as evidence on one of the exhibits, Petitioner's Exhibit U:

"The Chiefs of Police have been given the names of the aforementioned magazines with the order

that they are not to be sold, distributed or displayed to youths under 18 years of age."

And further:

"The Attorney General will act for us in cases of non compliance."

Now in view of statements like that by the Commission, how are they possibly in a position to come before Your Honor now and say that this is a very decent thing, suggested to us by the distributors themselves.

[fol. 37] I say that it is utterly without any warrant and that this line of testimony being offered before Your Honor should not be permitted.

Mr. Breen: This record is replete with testimony of withdrawal of books, returns and so on. I think we should be permitted to show, to let the record show that the withdrawals may have been for other reasons than the fear and trembling induced by threats.

The Court: It seems to me that the argument that Mr. Manges makes is a valid one, except that in direct examination he has brought out the fact that these books were returned by the witness as a result of the notice received, and that the purpose of returning these books and complying with the letters was to avoid prosecution.

Now for that reason, it does seem to me at the present time that it is proper cross examination of this witness, to show that there have been some feelings of voluntary cooperation on the part of the witness and his firm with the respondent Commission.

For that reason, I overrule your objection and note your exception.

Read the question please.

[fol. 38] (Petitioner's Exception Noted.)

(Stenographer repeated the question.)

A. I would say yes, it was discussed.

58. Q. And generally, Mr. Kaplan, Mr. Silverstein and the other publishers--

A. Excuse me, we are not publishers, we are wholesale distributors.

59. Q. You and your distributor, your associates, agreed that they would coöperate with the Commission in the matter of the obscene and the objectionable books?

A. I would say yes, we did. We said we would coöperate.

60. Q. Now can you tell us whether or not Max Silverstein & Son is a corporation?

A. No, it is a privately owned company, Martin Silverstein is the owner.

61. Q. It is not a partnership?

The Court: The witness indicates that it is a sole proprietorship.

A. No, it isn't a partnership.

62. Q. It isn't a corporation or proprietorship. It is owned by an individual?

A. Yes.

[fol. 39] Redirect examination.

By Mr. Manges:

63. Q. Mr. Kaplan, you have already explained why you took the books and magazines off sale. Was it for the same reason that your firm agreed to coöperate with the Commission?

A. I don't understand your question.

64. Q. The substance, as I understand it, you stated you took books off sale and refused to accept more accounts, you didn't sell any more books was because in effect you didn't want to get entangled with the authorities, with the Commission, in connection with any court proceeding?

A. That is correct.

65. Q. And I asked you, was it for the same identical reason that you agreed to coöperate with the Commission at this meeting that was referred to?

Mr. Breen: I object to the form of the question. If asked to state the reason why, I would not object, but I think that question is definitely leading in form.

The Court: It is a leading question Mr. Manges.

Mr. Manges: I will reframe it.

[fol. 40] 66. Q. Will you tell us— Will you explain to us why you agreed, why your firm agreed to cooperate with the Commission in its activities?

A. Well, we certainly felt that this Commission was a duly authorized organization, and naturally, with our doing business with so many accounts, we certainly felt that we didn't want to be involved in any court proceeding against ourselves as well as the people that we served.

67. Q. When you say "duly authorized organization", you mean it was ordered by the State through a resolution?

A. Yes.

Mr. Breen:

Recross examination.

68. Q. Does your company intentionally— Would your company intentionally distribute obscene or illegal literature?

Mr. Manges: This is objected to. This is not in issue before this court. This is a question of constitutionality.

The Court: No, it is not.

The Witness: I feel.

The Court: The attorney is directing his remarks to the Court. The objection is sustained. Your exception is noted.

[fol. 41] (Respondent's exception noted.)

69. Q. In your cooperation with the Commission, would your public relations in the community have any bearing on your decision?

A. I don't know.

70. Q. Has the firm Silverstein & Son, have they counsel, attorneys?

A. No we don't.

71. Q. This matter was not referred to the attorneys for the company?

A. No it wasn't.

72. Q. These decisions were made by you or Mr. Silverstein with respect to the withdrawal of books?

A. That is correct.

73. Q. Which, Mr. Silverstein, or you?

A. Either one, or both together.

74. Q. And they did that without any conference with counsel for the company?

A. That is correct.

Mr. Breen: That is all.

Mr. Manges: That is all.

[fol. 42] ALBERT J. MCALOON Sworn.

Mr. Manges:

Direct examination.

1. Q. Mr. McAloon, by whom are you employed?

A. The Rhode Island Commission to Encourage Morality in Youth.

2. Q. Is that Commission ordinarily referred to as the Rhode Island Commission On Youth, so designated on Commissionery?

A. It is.

3. Q. How long have you been in that capacity?

A. Since March of 1957.

The Court: Would you like to qualify your answer. I do read the papers.

A. From March 1957, to July 8th, 1960, and resuming on I think November 22nd, 1960.

4. Q. And have you been subpoenaed with a Subpoena Ducez Tecum to produce all reports of the Commission to the Governor and the Legislature?

A. Not to my knowledge, I was summoned here as a witness. You see all reports and all records were subpoenaed earlier in September as I understand it.

5. Q. There was a subpoena served as I understand it, to produce all annual reports?

A. I—

Mr. Breen: I think you asked him if he was here [fol. 43] in response to subpoena for today. Subpoena was continued, the subpoena you refer to was originally issued in this case.

6. Q. First of all, under Resolution 73, as amended, there is a duty imposed on the Commission to report annually to the Governor and General Assembly of Rhode Island?

A. Yes.

7. Q. Has the Commission rendered such reports annually since its creation?

A. Yes it has.

8. Q. Do you have with you a copy of such reports?

A. Yes.

9. Q. Mr. McAloon, was it the practice of the Rhode Island Commission On Youth, to send out—I will withdraw it. The Commission did send out to wholesalers, and retailers, and police departments, and educators, and others, notices to the effect that they found certain publications objectionable to sell to youth under 18, did it not?

A. I think I can best answer that in this way : The majority of the Commission decide what books are [fol. 44] objectionable for those under 18, and every time that went to the wholesaler and the Police Department got a mailing list. It did not always go to the retailer. Occasionally a compilation and summary of those so found was sent to retailers.

10. Q. Was this practice, Mr. McAloon, adopted by reason of a resolution of the Commission originally?

A. It was adopted as the result of meeting with the then Attorney General, Mr. Powers, in June, I believe, 1957. At which time, at the meeting called by him and the Commission, the people had asked for

such action on the part of the Commission, and excuse me, the wholesalers were part of that, it is academic they wanted it too.

11. Q. Did the Commission have regular meetings?
- A. Yes.
12. Q. How often did these meetings take place?
- A. The Commission ordinarily meets twice a month, except in the summer time when it is about once a month.
13. Q. Were minutes of these meetings kept?
- A. Yes.
- [fol. 45] 14. Q. And have you brought those minutes with you?
- A. The only minutes which were given to me,

Mr. Breen: I am sorry, I have these.

- A. I have minutes of December 4th, 1957.
15. Q. You have the minutes of the other meetings have you not?
- A. Yes.
16. Q. May we have them here at the end of the luncheon recess?
- A. I will try to get whatever is available.
17. Q. Now after notices were sent out, as you have described, with respect to the objectionability of paper bound books and magazines, were any steps taken on behalf of the Commission to ascertain whether the books stated to be objectionable for sale to youths under 18, were taken off sale?
- A. I don't understand that question.

The Court: Would you read the question.

(Stenographer repeated the question)

- A. No.
18. Q. So the Commission never knew whether its objective [fol. 46] had been obtained?
- A. Oh yes, the Commission had an idea, not an accurate idea, of some progress being made.
19. Q. Now you have heard it testified that Lieutenant Blessing would communicate with the Silverstein firm after these various notices on objectionability

were sent out to Silverstein. Do you mean to say that you had no knowledge that the Police Department was following up the matters in this way?

Mr. Breen: So we won't confuse everybody with knowledge of the Commission. I take it you mean did it have any procedure whereby it checks compliance with their directive; whether he knew or somebody else.

Mr. Manges: Whether he himself knew as Executive Secretary, or whether the Commission itself knew.

Mr. Breen: Whether he or a member of the Commission would know. Whether or not the Commission had any method of checking compliance, I think that is the basis of the question.

Mr. Manges: I want to find out about the police.

- A. To my knowledge, Mr. Manges, Lieutenant Blessing contacted Silverstein and Sons before we came into existence. After we came into existence and quite [fol. 47] some time after I met Lieutenant Blessing, then still later, it must have been a good two years, one and a half to two years, he did tell me he had some idea of the number of books withdrawn by Mr. Silverstein and Sons in the course of a year or two years.
20. Q. Now the Commission sent these notices to the Police Department?
- A. Yes.
21. Q. So that every time a notice was sent out, the Police Department knew which were the publications that the Commission wanted off sale, is that not right?
- A. The Commission—I think it is better stated this way—
22. Q. All I want is a yes or no answer to my question.

The Court: Read the question please.

(Stenographer repeated the question)

Mr. Breen: I object to the form of the question.

The Court: I think that accurately expresses the idea. The objection is overruled and your exception is noted.

(Respondent's exception noted)

[fol. 48] 23. Q. May we have the answer please, yes or no?

A. A yes or no answer doesn't answer it.

The Court: You answer it in your fashion then.

A. I think I can best give the thoughts of the Commission this way; that when these notices were sent to these people, it was with a lot of cooperation. If none were forthcoming, no action was taken. They realized they had a terrific educational job to do for two reasons: The changing, the broadening concept and precept of everybody as well as a flood risk of this type of material available to anybody in Rhode Island, which was not so in 1950, 1951 or 1952, was suddenly sold by 1955.

24. Q. Are you telling His Honor, that neither you nor the Commission knew which ones of the wholesaler distributors were following the Commission's recommendation as to taking books off sale and which ones were not?

A. The closest operation—

25. Q. Please don't make speeches. I ask for a yes or no answer.

[fol. 49] The Court: I think that question can be answered yes or no. Read the question please.

(Stenographer repeated the question.)

A. The best I can answer is, we did know that Mr. Silverstein & Son were cooperating with the Commission to the best of their ability within the law.

26. Q. How many wholesaler distributors were there in the State?

A. There were six I believe.

27. Q. Did you know which of the six were cooperating with the Commission by taking the books off sale and which of the six were not?

A. The result of the meeting—

28. Q. Yes or no?

A. Yes. We had some knowledge, not accurate.

29. Q. Some knowledge?

A. Yes.

30. Q. Not accurate knowledge?

A. No.

31. Q. So really didn't know?

A. Yes, we had some knowledge.

32. Q. Now ~~this~~ question of accuracy, I will ask if this is [fol. 50] an accurate statement by you, as quoted in the Providence Journal of September 23rd, 1959?

"Mr. McAloon was not willing to give a complete bill of health to all the wholesalers present".

Then I quote this statement:

"Four of the six are trying within their reasonable limits to cooperate," the Morality Commission Secretary said. "Two are definitely not trying, he said. "These two do not remove the books that are banned by his Commission from their stands".

Now I ask you, is that a correct statement?

A. It is not.

33. Q. Is that what you said?

A. I never used the word "banned", and the Providence Journal is not a reliable reporter in this case.

Mr. Manges: I ask that that last part be stricken.
The Court: Read the last part of the answer please.

(Stenographer repeated the last part of the answer.)

[fol. 51] The Court: I take it that your examination will go on for some time, so we will adjourn for lunch at this time.

Mr. Manges: These four annual reports we haven't had a chance to read them. May we take them and read them during lunch time?

The Court: They are not admitted in evidence. You may read them.

Lunch Recess

2:00 O'Clock

AFTERNOON SESSION

Mr. Manges: Your Honor, I have a batch of Committee Minutes that have just been furnished us. We would like a few minutes if it is possible.

The Court: Yes. You just let the sheriff know when you are ready.

Mr. Manges: May I have marked for identification the article in the Providence Journal of September 23rd, 1959 that I hold here.

Mr. Breen: I object to the admission of it.

The Court: It is being offered for identification.

Mr. Breen: Excuse me.

[fol. 52] The Court: This may be marked Petitioner's Exhibit 17 for identification.

(Newspaper article from the Providence Journal, September 23, 1959, marked Petitioner's Exhibit 17 for identification.)

34. Q. Mr. McAloon, I will read from the Providence Journal of September 23rd, 1959. I ask you if this quotation as attributed to you is correct, is a correct quote, talking about the wholesalers: "Four of the six are trying within their reasonable limits to cooperate". Did you make that statement?
A. I did.
35. Q. "Two are definitely not trying". Did you make that statement?
A. I did.
36. Q. "These two do not remove the books that are banned by his Commission from their stands." Now you say you did not use the word "banned" is that correct?
A. I never did.

37. Q. What did you say instead of "banned"?

A. Is that a quote, or is it just a reporter's interpretation?

38. Q. Well, there is a quotation at the beginning of the [fol. 53] word "Two are definitely not trying. There is no close, closing quotation on it, but I see it says, "Two are definitely not trying. Then it says, "He said, "These two do not remove the books that are banned from—

Mr. Breen: I object to the contents of the newspaper as official act or statement of said agency.

Mr. Manges: Just asking him if he made the statement.

The Court: I think it is the proper way to proceed.

Mr. Breen: All right. He is running into an examination.

A. I never used the word "banned", Mr. Manges, anywhere at any time.

39. Q. In other words, you mean that these two did not remove the books that the Commission had stated were in their opinion objectionable for sale to youth under 18?

A. I meant in that statement, if I can recall it—you realize that is over a year now—that the two did not take any action as far as I knew personally, [fol. 54] when they received the list.

40. Q. When you say the list, you mean the notices that were sent out by the Commission?

A. Yes.

41. Q. But that the other four did?

A. I cannot say that definitely. I said within their reasonable limits, if you notice.

42. Q. Yes. Now I refer to Petitioner's Exhibit Number 2, being the Commission's letter dated August 5, 1957, signed by you, addressed to Mr. Max Silverstein, or Max Silverstein & Son. Particularly the last sentence thereof, which reads:

"Looking forward to continued cooperation, I am,"

Will you tell us what you meant by continued co-operation?

Mr. Breen: I think the letter is clear without his interpreting it. The language seems clear, I don't see anything ambiguous in that. It seems clear. I think that is for the Court to interpret, that is understood isn't it?

[fol. 55] The Court: I will allow the question and note your exception.

(Respondent's exception noted.)

A. Whatever interpretation they wanted to place on it.

43. Q. What interpretation did you place on it?
A. I couldn't place any personal interpretation naturally. I used that as a phrase you find in many letters, both personal or professional or public. Whatever interpretation the receiver wanted to place on it.

44. Q. You stated this before, that: "We appreciate your cooperation in regard to the first list. . . ." That meant, did it not, that you were grateful for the steps that had been taken by this distributor with reference to the first list of allegedly objectionable material that the Commission had sent, isn't that right?
A. No, I couldn't say that.

45. Q. How wrong is that?
A. I didn't say there was anything wrong. I just cannot remember that far back.

46. Q. This is your statement! These are your words, not mine!

[fol. 56] The Court: What are you reading from now?

Mr. Manges: Mr. McAloon's letter to the Distributor Silverstein.

The Court: Is that an exhibit?

Mr. Manges: Plaintiff's Exhibit 2.

The Court: Petitioner's Exhibit 2.

Mr. Manges: Petitioner's Exhibit 2, dated August 5, 1957.

47. Q. It states at the beginning: "The Commissioners by majority vote have declared that the following three magazines are objectionable for 'sale, distribution or display' for youth under 18 years of age." Then it lists three magazines. Then it says, and I quote: "We appreciate your cooperation in regard to the first list. . . ." Now I say, isn't it a fact, that you were expressing gratitude for the action of this distributor in taking off books, taking off sale, books that were on the first list?

A. I would have to know the specific and the particular action he took, if any, after he received the list.

48. Q. Now if he had refused to take the books off that were on the first list, is this the kind of language you would address to him, "We appreciate your [fol. 57] cooperation in regard to the first list. . ." Please answer my question?

A. Cannot answer simply yes or no in that type of question, you know that.

49. Q. I am not on the witness stand, I know nothing of the sort. I ask the Court to instruct the witness to answer the question.

The Court: Read the question please.

(Stenographer repeated the question.)

The Court: That seems to be a clear enough question, it could be answered yes or no.

The Witness: May I say this to you?

The Court: If it is responsive.

The Witness: It is responsive. There was a previous notice before that August 5th letter, which would make sense to that letter.

Mr. Manges: Your Honor, I respectfully submit that this witness seems to be allergic to a yes or no answer. He wants to make speeches. His own counsel will bring out whatever further answer he wants. I think the witness should be directed to say yes or no to a simple question.

[fol. 58] The Court: Do you understand the question?

A. Yes I do.

The Court: Will you answer it.

Read the question please.

(Stenographer repeated the question.)

A. What is the question?

Mr. Manges: Just read it.

The Court: It seems clear enough to me. If the distributor had failed to take the books off the stand, would you have used the same language in sending the second letter? If that is the question, go ahead and answer it.

A. I don't know.

The Court: The answer is, "I don't know".

50. Q. I hold in my hands a copy of the Minutes of the Rhode Island Commission On Youth, Board Meeting, October 9, 1957. I would like to read into the record—This is produced by Mr. McAloon—I would like to read into the record two sentences therefrom. "Father Flannery questioned the state-wide compliance by the police, or anyone else, to [fol. 59] get the prescribed magazines off the stands. Mr. McAloon showed the commissioners the questionnaires sent to the chiefs of police from this office and returned to us."

Will you tell us, what were those questionnaires that are referred to in the minutes?

A. The questionnaires were sent to the various chiefs of police in the state asking them if they had followed up any list, if they had met any cooperation, or any negative action. I think that is about it.

51. Q. When you say, "followed up any list", you mean any list of the Rhode Island Commissioners, of the Rhode Island Commission on Youth, as to objectionable publications for sale to youths under 18?

A. That is right.

52. Q. From the minutes of the Rhode Island Commission on Youth, of October 23, 1957, produced by this witness, I should like to read a paragraph set forth on the first page thereof:

"Though Peyton Place, authored by Grace Metalious, has been voted objectionable by a majority of the Commission for sale, distribution or display [fol. 60] for youths under 18 years of age, the Chairman remarked that a Mr. Horan, Director of the Rhode Island Training School for Boys, had purchased a copy, from the Garden City, Cranston, Rexall Drugstore this date and that the rack was well stocked."

Mr. Sullivan is the Chairman of the Commission?

A. That is right.

53. Q. "Mr. Sullivan suggested calling the Cranston Chief of Police to inquire the reason Peyton Place was still being sold, distributed and displayed since the Police Departments had been advised of the Commission's vote. If no action is taken, the next move would be to talk with the Attorney General's office."

And lastly I would like—

The Court: You are reading this into the record?

Mr. Manges: Yes.

54. Q. And lastly I would like to read into the record the following excerpt from the "Annual Report of Rhode Island Commission to Encourage Morality in Youth. To the Honorable Governor and the General Assembly January, 1960". Pages two and three. This copy of the report having been produced by this witness.

[fol. 61] Beginning at page 2: "Thirty magazines and paperback pocketbooks were added to the previous list of publications found objectionable for youth under 18 by a majority vote of the Commission. This brings the total to 108.

The guide lists (requested by chiefs of police, distributors and educators in 1957) of the type of publications deemed objectionable for youth under 18 is still sent to all local distributors and chiefs of police in Rhode Island, with the result that in the last six months our newsstands show a very improved condition.

In most cases local distributors have been co-operative this year, withdrawing publications of the type listed in the Commission guide list and returning them to publishers.

This Commission feels that the guide list; Court action initiated by this Commission, and the co-operation of the Attorney General's Department is largely responsible for the "new look" on Rhode Island newsstands."

[fol.62] Now in view of this statement in the annual report of the Commission, do you still maintain that the Commission did nothing to ascertain whether there was any compliance by wholesalers or retailers with these notices of objectionability of publications which were sent out?

A. Other than that questionnaire previously referred to, sent to the chiefs of police, there was no concerted official action to check up on any type of investigation which may have been made by any body. I personally knew from personal conversations, that some publications had been voluntarily withdrawn.

55. Q. And yet the Commission was willing to certify to the Governor and to the General Assembly, the progress that it claimed to have made along this line, is that right?

A. Because there was progress, yes, certainly.

56. Q. You were doing your best to find out what progress, if any, was occurring, is that correct?

A. From time to time I did yes.

57. Q. Wouldn't you have regarded your Commission a laggard if it didn't try to ascertain whether it was [fol.63] accomplishing what it was trying to accomplish?

Mr. Breen: Objection: Asking for an opinion from the witness.

The Court: You feel that the question is objectionable.

Mr. Breen: Yes.

The Court: Objection is sustained.

Mr. Manges: Your witness.

The Court: Just for the purpose of securing some orderly procedure, in view of the fact that Mr. McAloon has been called by the Petitioner, presumably as an adverse witness, I would think that it might be better procedure for you not to cross examine this particular witness at this particular time. You will have an opportunity to put him on as your own witness later.

Mr. Breen: Have you more witnesses?

Mr. Manges: No.

Mr. Breen: We waive the cross examination and return you to the stand.

Mr. Manges: The petitioner rests. Your Honor.

[fol. 64] **Mr. ALBERT J. McALOON Recalled.**

Mr. Breen:

Direct examination.

58. Q. There was testimony from the Annual Report to the Governor and the General Assembly in January 1960. I ask you whether or not you can identify this as the office copy of that report?

A. Yes, that is the office copy.

Mr. Breen: I want to offer this in as an exhibit, as respondent's exhibit, the whole thing.

Mr. Manges: No objection.

The Court: The report may be introduced and marked Respondent's Exhibit A.

(Annual Report of Rhode Island Commission to Encourage Morality in Youth to the Honorable Governor and the General Assembly, January 1960, marked Respondent's Exhibit A)

59. Q. Mr. McAloon, would you identify the Annual Report to the Governor and the General Assembly of the Commission to Encourage Morality in Youth, for

the years, 1957, 1958, and 1959, would you identify that as the office copies of those reports?

A. They are.

[fol. 65] Mr. Breen: May we offer those as Exhibit Number B.

Mr. Manges: We didn't offer anything in respect to those reports. I think that they are irrelevant under the circumstances.

Mr. Breen: They were contained in the Subpoena, Duces Tecum.

Mr. Manges: That doesn't make them admissible in evidence. We could have received thousands of papers under Subpoena Duces Tecum.

Mr. Breen: There was testimony here from exhibits, as to 1957, 1958 and 1959, without specifically enumerating them. Those years cover this general period of reports of the Commission. The only report from which the direct quotation was taken was the year 1960; however, in the exhibits is evidence reported in these reports for the years the reports of the activities of the Commission.

Mr. Manges: We regard those as purely self serving declarations.

The Court: Yes.

Mr. Manges: It is quite something apart to have an admission against interest offered for the balance of the documents entered. We did make an ad [fol. 66] admission against interest in the 1956 report, we didn't refer to the others.

The Court: I cannot see the relevancy of those, for that reason I sustain the objection to the 1957, 1958 and 1959 reports, and note your exception.

(Respondent's exception noted)

60. Q. In direct examination there was reference to the minutes of your meeting on October 23, 1957, and I ask you to identify that as the office copy of that meeting?

A. Yes.

61. Q. Is that complete?

A. Yes.

Mr. Breen: May I offer that as Respondent's Exhibit number 2?

Mr. Manges: No objection.

The Court: The minutes of the meeting of October 23, 1957, October 23, 1957?

The Witness: Yes.

The Court: That is Respondent's Exhibit B.

(Minutes of meeting October 23, 1957, marked Respondent's Exhibit B)

[fol. 67] 62. Q. And would you identify the minutes of the meeting of October 9th, 1957, the minutes of the Board Meeting?

A. Yes.

63. Q. Is that complete?

A. It is.

Mr. Breen: I would offer that as respondent's exhibit D.

Mr. Manges: C.

The Court: Any objection?

Mr. Manges: No.

The Court: The minutes of the meeting of October 9, 1957, may be marked Respondent's Exhibit C.

(Minutes of the meeting of October 9, 1957 marked Respondent's Exhibit C)

62. Q. Mr. McAloon, you testified to a meeting in the organization of the Committee, held at the invitation of the Attorney General?

A. That is right.

63. Q. Can you tell us when that meeting was held?

[fol. 68] A. If I remember correctly, it was June 24th or 25th, 1957.

64. Q. Who was in attendance at that meeting?

A. Well, there were—

Mr. Manges: I object to this, it is not within the issues of this action and not binding on the petitioners.

Mr. Breen: In response to a question by the Petitioner's counsel, the testimony with respect to this meeting is in the record, and I want to ask him whether or not in pursuance to that invitation the distributors attended the meeting. I think it is already in the record.

Mr. Manges: It has nothing to do with the constitutionality of this Commission, and the legality or illegality of the respondent's compliance with the statute.

The Court: I will hear you in reference to that.

Mr. Breen: I appreciate the position of my brother, that the acts of the committee do not determine the constitutionality of the statute yet the [fol. 69] testimony is replete here with the record of the acts of the Commission, and one of the items was this meeting by the Attorney General. I have a note here with respect to the reference to it. Now I think we should be permitted to clarify the record with respect to the action of the Attorney General at that meeting.

The Court: I will allow you to introduce the minutes of the meeting you refer to, although at the present moment I cannot see the relevancy of it.

Mr. Breen: The Court can take judicial notice of the function of the Attorney General, but I had the reference here to it in direct examination.

The Court: Do you have specific minutes of a meeting held ready to offer?

65. Q. I doubt that. You wouldn't keep minutes of the Attorney General's meeting?

A. No.

66. Q. I will withdraw that question then.

On these exhibits, are the members of the Commission set forth on these letterheads?

[fol. 70] A. Yes. If they are up to date. In 1957 you will see only 5 members, in 1959 and 1960 you will see 9.

67. Q. You had a motion didn't you to add two new members?

A. Yes.

8. Q. The membership of the Commission is in the record?

Mr. Manges: There was an order entered, Your Honor, March 17th, 1960, adding the respondents Doctor Charles Goodman and Eustace T. Pliakas.

Mr. Breen: So that is the record of the membership.

Mr. Manges: It is complete.

Mr. Breen: Yes. That does it.

The Court: That is all.

Mr. Breen: Yes. The State will rest and the respondents.

Mr. Manges: The petitioners rest.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Breen: May it please the Court, there is a welter of exhibits, and I suggest to the Court that the matter be presented to you by way of memorandum so we could organize these exhibits in an intelligent presentation. However, I leave it to the [fol. 71] wisdom and the wish and the desire of the Court, but it is possible that a written memorandum will give you a more orderly presentation than oral arguments.

Mr. Manges: We will be guided by Your Honor's wishes. We have already submitted a memorandum of our position on the law, generally, in connection with our opposition to the motion to dismiss, but if Your Honor wishes a new brief . . .

The Court: Who heard the previous motion?

Mr. Manges: Mr. Justice McKiernan.

The Court: I don't see any indication on the jacket. Was that heard on June 16th?

Mr. Manges: That is correct Your Honor.

Mr. Breen: I think that my brothers are not aware of the practice, that memorandums are not generally considered a part of the court records. There is a possibility that they would not be included in the file.

The Court: Would your memorandum on this particular matter today be the same memorandum submitted earlier, or do you care to amplify it?

[fol. 72] Mr. Manges: Very probably it would be slightly amplified in the light of inter relating of specific exhibits to the propositions of law that we have contended.

The Court: Then suppose I permit briefs to be filed. How much time would be required, bearing in mind the fact that you are approaching the Christmas season, that might interfere with somebody on one side or the other.

Mr. Manges: I imagine our side will want access to the exhibits Your Honor. We will require all the exhibits. If we have the exhibits, I think within a week, we can submit a memorandum.

Mr. Stanzler: It is suggested that as the Court takes a recess within a week or two, perhaps by January 5th.

The Court: I was going to suggest four weeks, if that will give ample time?

Mr. Manges: Yes, we will only take a week. Does Your Honor want to dispose of this before Christmas?

The Court: Not necessarily. I will give you to January 10th.

[fol. 73] Mr. Manges: May we have a week to reply to the memorandum of the Attorney General?

The Court: Yes, briefs for January 10th and reply briefs by the 17th, is that satisfactory?

Mr. Breen: Satisfactory to me, yes.

The Court: In that event, that means presumably that oral arguments will not be necessary, or would you like to make oral arguments sometime after that?

Mr. Breen: I think the briefs would be satisfactory, sufficient.

Mr. Manges: If after reading the briefs . . .

The Court: If I am still bewildered, I will let you know. I think I made a mistake in the date, that I

mentioned. That would be January 3. I think we are in agreement for four weeks, it should be five weeks, that would make it the 10th of January. January 10th for original briefs. Unless you want the 3rd?

Mr. Manges: Let's leave it the 10th and the 17th.

The Court: Very well, the 10th and the 17th.

[fol. 74] Mr. Stanzler: I think we will have a motion to withdraw some of these exhibits to make a photostat of. I would like to make copies of the respondent's exhibits, if I may withdraw them, and I will make a copy for Mr. Breen. I will have the appropriate order drawn up and have you sign in, if it is satisfactory to the Court.

The Court: You are going to need some of the petitioner's exhibits too?

Mr. Manges: Yes Your Honor. They may have copies of all the exhibits, because they are the copies of notices sent down by the Commission.

Mr. Breen: We may have copies.

I certify the foregoing to be a true and accurate transcript of my shorthand notes taken at the time and place aforementioned.

Vera A. Carlson, Court Stenographer.

Allowed, Cappelli, P.J., May 10, 1961.

[fol. 75]

PETITIONER'S EXHIBIT 1

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street
Providence 3, R. I.

July 19, 1957

Mr. Max Silverstein
334 South Water Street
Providence, R. I.

Dear Mr. Silverstein:

This agency was established by legislative order in 1956 with the immediate charge to prevent the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.

The Commission have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths under eighteen years of age.

Cabaret—Published monthly at 8150 North Central Park Avenue, Skokie, Illinois, July 1957 issue.

Modern Man—Published monthly at 8150 North Central Park Avenue, Skokie, Illinois, July 1957 issue.

Gent—Published bi-monthly by Excellent Publications, 48 West 48th Street, New York 36, N. Y., August 1957 issue.

The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.

The Attorney General will act for us in case of non-compliance.

The Commissioners trust that you will cooperate with this agency in their work. They fully realize the complexity of this problem but believe, in view of the need of strengthening our youths, improving family life and preventing un-social behavior, that the above-named publications are definitely objectionable under Chapter 610 of the general laws as amended.

Another list will follow shortly.

Thanking you for your anticipated cooperation, I am,

Sincerely yours

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

nlw

[fol. 76]

PETITIONER'S EXHIBIT 2

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street

Providence 3, R. I.

August 5, 1957

Mr. Max Silverstein
 Max Silverstein & Son
 334 Water Street
 Providence, R. I.

Dear Mr. Silverstein:

The Commissioners by majority vote have declared that the following three magazines are objectionable for "sale, distribution or display" for youth under 18 years of age.

Adam—Vol. 1 No. 8, no month indicated, published by the Knight Publishing Company, Prismatic Building, Los Angeles 46, California.

Scamp—Published bi-monthly by Splendid Publications, Inc., 509 Fifth Avenue, New York 17, New York, Vol. 1 No. 3, September 1957 issue.

Jem —Vol. 1 No. 6, published bi-monthly, address 801 Palisade Ave., Union City, New Jersey, August 1957 issue.

We appreciate your cooperation in regard to the first list. If you have questions regarding the aims or methods of our Commission I suggest that you contact me at the above address.

Looking forward to continued cooperation, I am,

Sincerely yours,

ALBERT J. McALOON
 Albert J. McAloon
 Executive Secretary

nlw

[fol. 77]

PETITIONER'S EXHIBIT 3**RHODE ISLAND COMMISSION ON YOUTH**49 Westminster Street
Providence 3, R. I.

August 23, 1957

Mr. Max Silverstein
Max Silverstein & Son
344 Water Street
Providence, R. I.

Dear Mr. Silverstein:

The following four (4) magazines have been found objectionable for "sale, distribution or display for youths under 18 years of age".

Dare —August 1957, Vol. 2, No. 9. Published bi-monthly by Fiction Publications, Inc., 80 Fifth Avenue, New York 11; N. Y.

Gala —September 1957, vol. 8, No. 3. Published bi-monthly by Gala Magazine Corp., 509 Fifth Avenue, New York 17, N. Y.

Adam —No month indicated, Vol. 1, No. 9. Published bi-monthly by Knight Publishing Co., Prismatic Building, Los Angeles 46, Calif.

Picture Digest—October 1957; Vol. 31, No. 2. Published bi-monthly by Plaza Digest, 509 Fifth Avenue, New York 17, N. Y.

Thanking you for your past cooperation, I am,

Sincerely yours,

/s/ **ALBERT J. McALOON**
Albert J. McAloon
Executive Secretary

nlw

[fol. 78]

PETITIONER'S EXHIBIT 4

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street
Providence, Rhode Island

September 25, 1957

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following magazines, by a majority vote of the Commission, have been found objectionable for sale, distribution or display for youths under 18 years of age.

Adam —1957, Annual

Modern Man—Vol. VII, No. 4,
October 1957✓Jem —December, 1957 (650
picked up. Draw 2500)(Give release 9/3) ✓Night & Day—Vol. 9, No. 10, October 1957 (1600 Draw)
(1025)

Thank you for your cooperation.

(Seamp Nov. Draw 1300 (550))

(Paris Life Oct. Draw 500-(275))

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

Sept. 19th

nlw

[fol. 79]

PETITIONER'S EXHIBIT 5**RHODE ISLAND COMMISSION ON YOUTH**
49 Westminster Street
Providence, Rhode Island

October 8, 1957

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following magazines, by a majority vote of the Commission, have been found objectionable for "Sale, distribution or display for youths under 18 years of age".

Tomcat—Vol. 1, No. 4, no date

21 —Annual, 1956-57

1500 Posted Ret. 620 + Follies—Vol. 2, No. 6, November
400 19571800 " " 745 + Gala —Vol. 8, No. 4, November
450 1957

Adam —Vol. 1, No. 11, no date

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. MCALOON
Albert J. McAloon
Executive Secretary

[fol. 80]

PETITIONER'S EXHIBIT 6**RHODE ISLAND COMMISSION ON YOUTH**

49 Westminster Street
Providence, Rhode Island

October 15, 1957

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following named book, by a majority vote of the Commission, has been found objectionable for "sale, distribution or display for youths under 18 years of age".

The book has been published in hard cover and in paper backs.

PEYTON PLACE—Grace Metalious

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

nlw

[fol. 81]

PETITIONER'S EXHIBIT 7

RHODE ISLAND COMMISSION ON YOUTH
 49 Westminster Street
 Providence, Rhode Island

November 6, 1957

Mr. Martin Silverstein
 Max Silverstein & Son
 344 Water Street
 Providence, Rhode Island

Dear Mr. Silverstein:

The following magazines, by a majority of vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

	Return
(Draw 800) True Life Secrets—Vol. 1, No. 35 (cap)	375
	December 1957
1800 Laff Annual —Winter 1957 (Ind)	1200
600 Glamor Parade —Vol. 2, No. 3 (K)	375
	December, 1957
2000 Frolic —Vol. 7, No. 3,	1400+
	December 1957
1300 Follies —Vol. 3, No. 1 (K)	700+
	January 1958 (K)
(Not Ours) Modern Man —Quarterly, Volume 8	

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
 Albert J. McAloon
 Executive Secretary

nlw

[fol. 82]

PETITIONER'S EXHIBIT 8

RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence, Rhode Island

November 19, 1957

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following magazines, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

Modern Man—November 1957, Vol. VII,
No. 5-77.

Draw Ret. Monsieur —January, Vol. 1, No. 5.

2700 1450

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. MCALOON
Albert J. McAloon
Executive Secretary

nlw

[fol. 83]

PETITIONER'S EXHIBIT 9**RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence 3, R. I.**

Vendors of literature, distributors and retailers have the responsibility to know the laws governing the sale of their literary wares to both juveniles and adults. Ignorance of the law is no defense against action instituted by citizens or official bodies.

However, the Commission is pleased to forward these enclosures to you for your careful study. These are copies of the Rhode Island laws governing the sale and distribution of obscene and pornographic literature to youths under 18 (S444, at upper left hand corner of single sheet) and S319 (upper left hand corner of stapled sheets).

It is worth noting that S444 has been recently amended to broaden the powers of this Commission, giving us broad investigative powers to combat delinquency and waywardness, to educate the public on the causes and to recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes. The duty to investigate and recommend prosecution of all violations of the Rhode Island laws pertaining to the sale and distribution of obscene and pornographic literature to juveniles remains in the statute.

The law S319 has been recently amended also to give citizens more protection against purveyors of obscene and pornographic literature. Your attention is drawn to page 2 (stapled sheets) paragraph 11-31-13, especially.

Though this letter and the enclosures are not required of us by law, the Commission forwards them to you with the earnest hope that you will initiate your own action in re-examining your literary stock. Please remember that S319 (stapled sheets) is a law that applies to the general public, not just juveniles.

As a further aid, we are enclosing a list of periodicals which have been found objectionable for youths under 18

by a majority vote of the Commission. Its use as a guide does not preclude legal action by citizens or official organizations on future issues of the listed publications or other unnamed publications which could be cited under both S444 or S319 for Court action.

If you have any questions regarding this letter, please do not hesitate to contact us.

Sincerely yours,

Albert J. McAloon
Executive Secretary

[fol. 84]

PETITIONER'S EXHIBIT 10

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street
Providence, Rhode Island

December 2, 1957

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following magazine, by a majority vote of the Commission, has been found objectionable for "sale, distribution or display for youths under 18 years of age".

Modern Man—December 1957, Vol. VII

No. 6-78 (Not ours)

Thank you for your cooperation.

Sincerely yours,

Albert J. McAloon
Albert J. McAloon
Executive Secretary

nlw

[fol. 85]

RHODE ISLAND COMMISSION ON YOUTH**49 Westminster Street
Providence, Rhode Island****December 17, 1957**

**Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island**

Dear Mr. Silverstein:

The following magazines, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

(Draw 450 Ret. 360) Glance—December, Vol. 2, No. 1

(825 682) He. —January 1958, Vol. 3,
No. 6

(900 700) Rogue —January 1958, Vol. 3,
No. 1

Thank you for your cooperation.

Sincerely yours,

/s/ **ALBERT J. McALOON**
Albert J. McAloon
Executive Secretary

nlw

[fol. 86]

RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence, Rhode Island

December 27, 1957

(Rt Ross)

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following magazines, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age":

Draw Ret.

2,000 1,540 "Gala" —January 1958, Vol. 8, No. 5
2,000 1,600 "Frolic" —February 1958, Vol. 7, No. 4

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

nlw

[fol. 87]

RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence, Rhode Island

January 20, 1958

(K)

Mr. Martin Silverstein
 Max Silverstein & Son
 344 Water Street
 Providence, Rhode Island

Dear Mr. Silverstein:

The following magazines, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

Adam—No date indicated, Vol. 2, No. 2
 (Not ours)

Draw Ret

500 364 Dare —March 1958, Vol. 2, No. 12

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
 Albert J. McAloon
 Executive Secretary

AJMc/nlw

Draw	Ret	Jan. 14
500	210	Paris Life—
3,000	1,560	Gem—

(K)
 (e)

[fol. 88]

RHODE ISLAND COMMISSION ON YOUTH
 49 Westminster Street
 Providence, Rhode Island

January 31, 1958

(Joel)

Mr. Martin Silverstein
 Max Silverstein & Son
 344 Water Street
 Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

(Kab 6)		Draw	Ret
Gala	—March, 1958, Vol. 8, No. 6	2,000	1,450
Dolly	—By Fan Nichols—Beacon Book—Paperback	200	150
Passion In The Pines	—By Jack Woodford and John B. Thompson—Beacon Book, Paperback	200	140

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON

(nlw)

Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 89]

RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence, Rhode Island

February 21, 1958

(Pickup)

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

Playboy—February 1958, Vol. 5, No. 2

Scamp—March, 1958, Vol. 1, No. 5

Modern Man—February 1958, Vol. VII, No. 8-80.

Night & Day—February 1958, Vol. 10, No. 2

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
(nlw)

Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 90]

Call Blessing
Tuesday

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street
Providence, Rhode Island

March 14, 1958

Mr. Martin Silverstein
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for youths under 18 years of age.

		Draw	Return
Vue	—May, 1958, Vol. 5, No. 2	1,200	875
Gala	—May, 1958, Vol. 9, No. 1	1,500	1,050
Scamp	—May, 1958, Vol. 1, No. 6	2,000	1,400

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Executive Secretary

(Frank Kozlor

Get figures and call
Lt. Blessing Tuesday.)

[fol. 91]

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street
Providence, Rhode Island

April 7, 1958

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been objectionable for "sale, distribution or display for youths under 18 years of age".

Frolic — June, 1958—Vol. 7, No. 6

The Dude—May, 1958,—Vol. 2, No. 5

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 92]

RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence, Rhode Island

June 24, 1958

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "sale, distribution or display for youths under 18 years of age".

Adam —Monthly, Vol. 2, No. 7

Modern Man—July, 1958, Vol. VIII, No. 1-85

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 93]

RHODE ISLAND COMMISSION ON YOUTH
49 Westminster Street
Providence, Rhode Island

July 3, 1958

Mr. Martin Silverstein*
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "sales, distribution or display for youths under 18 years of age":

Follies —September, 1958, Vol. 3, No. 5

Sir Knight—No date, Vol. 1, No. 2

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. MCALOON
(nlw)
Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 94]

(OK-8/25/58 FK)

RHODE ISLAND COMMISSION ON YOUTH

49 Westminster Street
Providence, Rhode Island

July 28, 1958

Mr. Martin Silverstein
 Max Silverstein & Son
 344 Water Street
 Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission have been found objectionable for "sale, distribution or display for youths under 18 years of age".

	Draw	Ret
Vue—September, 1958	1,200	960
Jem—August, 1958	3,000	2,400
Gala—September, 1958	1,500	1,260

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
 Albert J. McAloon
 Executive Secretary

AJMc/nlw

(CALL LT. BLESSING)

[fol. 95]

PETITIONER'S EXHIBIT 11**RHODE ISLAND COMMISSION ON YOUTH****ROOM 626****49 Westminster Street
Providence 3, Rhode Island****Telephone: Ga 1-6429****Albert J. McAloon
Executive Secretary****From: Rhode Island Commission On Youth****To: All Retailers of Publications
in the State of Rhode Island****Gentlemen:**

The Rhode Island Commission On Youth, unanimously established by the Rhode Island legislature in 1956, is pleased to offer you these enclosures, namely, the law on obscenity, the amendment creating this Commission, and a list, of the most recent publications found objectionable for "sale, distribution or display for youth under 18 years of age."

This list should be used as a guide in judging other similar publications not named.

Your cooperation in removing the listed and other objectionable publications from your newsstands will be appreciated. Cooperative action will *eliminate* the necessity of our recommending prosecution to the Attorney General's department.

Sincerely yours,

**Joseph A. Sullivan Chairman
Rabbi Abraham Chill
Reverend Edward H. Flannery
Reverend Howard C. Olsen**

nlw**Encls.**

[fol. 96]

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 WESTMINSTER STREET
PROVIDENCE 3, RHODE ISLAND

Joseph A. Sullivan	Telephone: Ga. 1-6429
Chairman	
Rabbi Abraham Chill	Albert J. McAloon
Reverend Edward Flannery	Executive Secretary
Reverend Howard Olsen	

This guide list of publications, found objectionable for youths under 18, is not exhaustive. We suggest that you personally inspect your newsstands for new issues of these and similar publications.

<i>Publications</i>	<i>Issue</i>
Frolic	—August 1958, Vol. 8, No. 1
Paris Life	—September 1958, Vol. 4, No. 34
Rogue	—July 1958, Vol. 3, No. 5
Peyton Place	—By Grace Metalious, Hard or paper-backed publications
Dark Quarters	—By Stella Hampton, A Fabian Original Novel, Paper-backed.
Passion In The Pines	—By Jack Woodford and John B. Thompson, Paper-backed, Beacon Book
Dolly	—By Fan Nichols, Paper-backed, Beacon Book

[fol. 97]

**GENERAL LAWS OF RHODE ISLAND, 1938
CHAPTER 610, SECTION 13, ENTITLED:
OFFENSES AGAINST CHASTITY, MORALITY
AND DECENCY.**

"Sec. 13. Every person who shall import, print, publish, sell, or distribute any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent, or impure language, or manifestly tending to the corruption of the morals of youth, or any print, picture, figment, or other description which is indecent, impure or manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education, or shall buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper or other thing, either for the purpose of sale, exhibition, loan, or circulation, or with intent to introduce the same into any family, school, or place of education, shall be imprisoned not exceeding 2 years or be fined not exceeding \$1,000 nor less than \$100.00."

[fol. 98]

S 182
Approved
April 9,
1956

**STATE OF RHODE ISLAND
JANUARY SESSION, 1956—CHAPTER 3686
CHAPTER 3686**

**AN ACT IN AMENDMENT OF AND IN ADDITION TO
CHAPTER 610 OF THE GENERAL LAWS, ENTITLED
"OFFENSES AGAINST CHASTITY, MORALITY AND
DECENCY," AS AMENDED.**

PREAMBLE

It is hereby declared that the publication, sale and distribution to minors of comic books devoted to crime, sex,

horror, terror, brutality and violence, and of pocket books, photographs, pamphlets, magazines and pornographic films devoted to the presentation and exploitation of illicit sex, lust, passion, depravity, violence, brutality, nudity and immorality are a contributing factor to juvenile crime, basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state. Therefore, the provisions hereinafter prescribed are enacted and their necessity in the public interest is hereby declared as a matter of legislative determination.

It is enacted by the General Assembly as follows:

SECTION 1. Chapter 610 of the general laws, entitled "Offenses against chastity, morality and decency," amended as to reorganization by chapter 669 of the public laws, 1939, and as further amended by chapter 2310 of the public laws, 1949, by chapter 2600 of the public laws, 1950, chapter 2818 of the public laws, 1951, and by chapter 3031 of the public laws, 1952, is hereby further amended by adding [fol. 99] thereto the following sections:

"Sec. 47. Publication and Distribution of Comic Books.

Every person who shall publish or distribute for resale any book, pamphlet or magazine consisting of narrative material in pictorial form, colored or uncolored, and commonly known as comic books, the title or titles of which contain the words crime, sex, horror or terror or the content of which is devoted to or principally made up of pictures or accounts of methods of crime, of illicit sex, horror, terror, physical torture, brutality or physical violence shall, upon conviction, be punished by a fine of not less than one hundred (\$100.00) dollars, nor more than one thousand (\$1,000.00) dollars, or by imprisonment for not more than two (2).

"Sec. 48. Sale to Minors.

Every person who shall willfully or knowingly sell, lend, give away, show, advertise for sale or distribute com-

mercially to any person under the age of eighteen (18) years or has in his possession with intent to give, lend, show, sell, distribute commercially, or otherwise offer for sale or commercial distribution to any individual under the age of eighteen (18) years any pornographic motion picture, or any still picture or photograph, or any book, pocket book, pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or [fol. 100] presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use shall, upon conviction, be punished by a fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars or by imprisonment for not more than two (2) years, or by both such fine and imprisonment.

For the purpose of this section 'knowingly' shall mean having knowledge of the character and content of the publication or failure to exercise reasonable inspection which would disclose the content and character of the same.

"Sec. 49. Separability."

If any provision of sections 47 and 48 or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of said sections and the applicability of such provision to other persons or circumstances shall not be affected thereby."

Sec. 52. This act shall take effect upon its passage.

[fol. 101]

STATE OF RHODE ISLAND
JANUARY SESSION, 1956

1102

No. 73

H 1000

Approved

April 26, 1956

RESOLUTION creating a commission to encourage morality in youth.

Resolved, That a commission be and it is hereby created; consisting of 9 members to be appointed by the governor, one of whom he shall designate as chairman.

Forthwith upon the passage of this resolution, the governor shall appoint 1 member to serve until the 1st day of March, 1957, 1 (one) member to serve until the 1st day of March 1958, 1 member to serve until the 1st day of March, 1959, and 1 member to serve until the 1st day of March, 1960; and 1 member to serve until the 1st day of March, 1961. During the month of February, 1957, and annually thereafter, the governor shall appoint a member to serve for a term of 5 years commencing with the 1st day of March, then next ensuing and until his successor has been appointed and qualified to succeed the member whose term will then next expire.

Vacancies on said commission shall be filled for the unexpired term of the member or members being succeeded.

Any member shall be eligible to succeed himself.

Forthwith upon the passage of this resolution the commission shall meet and organize.

[fol. 102] It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined in sections 13, 47, 48 and

49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections 13, 47, 48 and 49 of said chapter 610, as amended.

Said commission may employ such assistants, experts, and other personnel as may be necessary in the proper exercise of its duties hereunder.

The members of said commission shall serve without compensation but shall be allowed their necessary and travel expensed, and shall report annually during the month of January to the governor and the general assembly as to their activities and findings; and be it further

Resolved, That the general assembly shall annually appropriate such sum as may be necessary to carry out the purposes of this resolution; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt [fol. 103] by him of proper vouchers duly authenticated; and be it further

Resolved, That for the purpose of carrying out the provisions of this resolution for the period ending June 30, 1957, the sum of \$10,000.00 be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated.

[fol. 104]

PETITIONER'S EXHIBIT 12

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence, Rhode Island

Telephone Ga 1-6429

JOSEPH A. SULLIVAN

Chairman

Rabbi Abraham Chill

Reverend Edward Flannery*

Reverend Howard Olsen

Clarencee Sherman

ALBERT J. MCALOON

Executive Secretary

September 11, 1958

Mr. Martin Silverstein
 Max Silverstein & Son
 344 Water Street
 Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for or selling to youths under 18 years of age."

Spree—Vol. 1, No. 2, no date indicated

Frolic—Vol. 8, No. 2, October, 1958

High—Vol. 1, No. 8, November, 1958

Thank you for your cooperation.

Sincerely yours,

s/ ALBERT J. MCALOON
 Albert J. McAloon
 Executive Secretary

AJMc/nlw

[fol. 105]

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence, Rhode Island.

Telephone Ga 1-6429

JOSEPH A. SULLIVAN
Chairman

ALBERT J. McALOON
Executive Secretary

Rabbi Abraham Chill
Reverend Edward Flannery
Reverend Howard Olsen
Clarence Sherman

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

October 22, 1958

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for or selling to youths under 18 years of age."

Mermaid —Collector's Edition
Vol. 1, No. 1

Sir Knight—No date indicated
Vol. 1, No. 4

Monsieur —November, 1958, Vol. 1, No. 8

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 106]

RHODE ISLAND COMMISSION ON YOUTH

ROOM 626
 49 Westminster Street
 Providence, Rhode Island

Telephone Ga 1-6429

JOSEPH A. SULLIVAN
 Chairman

ALBERT J. McALOON
 Executive Secretary

Rabbi Abraham Chill
 Reverend Edward Flannery
 Reverend Howard Olsen
 Clarence Sherman

Mr. Martin Silverstein
 Max Silverstein & Son
 344 Water Street
 Providence, Rhode Island

November 26, 1958

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

I am A Lesbian--By Lora Sela--Paperback. Säber Book Publication.

Monsieur -- November, 1958, Vol. 1, No. 8.

Adam -- No date indicated, Vol. 2, No. 12.

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
 Albert J. McAloon
 Executive Secretary

AJMc/nlw

[fol. 107]

[Handwritten notation—Ga 1-3121—Ext 369—Lt. Blessing]

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence, Rhode Island

Telephone Ga 1-6429

JOSEPH A. SULLIVAN
Chairman

ALBERT J. McALOON
Executive Secretary

Rabbi Abraham Chill
Reverend Edward Flannery
Reverend Howard Olsen
Clarence Sherman

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

December 4, 1958

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

Seramp—January, 1959, Vol. 2, No. 4

Jem —January, 1959, Vol. 2, No. 5

Venus —No date indicated, Vol. 1.

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAlloon
Executive Secretary

AJMc/nlw

[fol. 108]

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence, Rhode Island.

Telephone Ga 1-6429

JOSEPH A. SULLIVAN
Chairman

ALBERT J. McALOON
Executive Secretary

Rabbi Abraham Chill
Reverend Edward Flannery
Reverend Howard Olsen
Clarence Sherman

Mr. Martin Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

January 14, 1959

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for or selling to youths under 18 years of age."

Monsieur —February, 1959, Body Beautiful Publishers.

Night & Day—January, 1959, Halho Corp.

Thank you for your cooperation.

Sincerely yours,

/s/ **ALBERT J. McALOON**
Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 109]

**RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence 3, Rhode Island**

Telephone Ga 1-6429

JOSEPH A. SULLIVAN

Chairman

Rabbi Abraham Chill

Reverend Edward Flannery

Reverend Howard Olsen

Joseph Leonelli

Raymond J. Pettine

David A. Coughlin

Omer A. Sutherland

Miss Ruth Thomas

ALBERT J. McALOON

Executive Secretary

February 16, 1959

Mr. Martin Silverstein

Max Silverstein & Son

344 Water Street

Providence, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

Adam —Vol. 3, No. 2.

I Am A Woman—By Ann Bannon, Fawcett World Library.

Thank you for your cooperation.

Sincerely yours,

/s/ **ALBERT J. McALOON**

Albert J. McAlloon

Executive Secretary

AJMc/nlw

[fol. 110]

RHODE ISLAND COMMISSION ON YOUTH

ROOM 626

49 Westminster Street
Providence 3, R. I.

Telephone Ga 1-6429

JOSEPH A. SULLIVAN

Chairman

Rabbi Abraham Chill

Reverend Edward H. Flannery

Reverend Howard C. Olsen

David A. Coughlin

Joseph Leonelli

Raymond J. Pettine

Omer A. Sutherland

Miss Ruth Thomas

ALBERT J. McALOON

Executive Secretary

July 2, 1959

Mr. Martin Silverstein
 Max Silverstein & Son
 344 South Water Street
 Providence 3, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

Pose —August, 1959, Vol. 3, No. 11

Adam —No date, Vol. 3, No. 7

Picture Show —Sept. /59, Vol. 2, No. 3

Plush —August, 1959, Vol. 1, No. 5

Spree —No date, Vol. 1, No. 10

Thank you for your cooperation,

Sincerely yours,

/s/ ALBERT J. McALOON
 Albert J. McAlloon
 Executive Secretary

AJMc/nlw

[fol. 111]

**RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence 3, R. I.**

Telephone Ga 1-6429

JOSEPH A. SULLIVAN
Chairman

ALBERT J. McALOON
Executive Secretary

Rabbi Abraham Chill
Reverend Edward H. Flannery
Reverent Howard C. Olsen
David A. Coughlin
Joseph Leonelli
Raymond J. Pettine
Omer A. Sutherland
Miss Ruth Thomas

July 21, 1959

Mr. Martin Silverstein
Max Silverstein & Son
344 South Water Street
Providence 3, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

Knave — Sept./59, Vol. 1, No. 5

Monsieur—Sept./59, Vol. 2, No. 4

Thank you for your cooperation.

Sincerely yours,

/s/ **ALBERT J. McALOON**
Albert J. McAlloon
Executive Secretary

AJMc/nlw

[fol. 112]

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence 3, R. I.

Telephone Ga 1-6429

JOSEPH A. SULLIVAN

Chairman

Rabbi Abraham Chill

Reverend Edward H. Flannery

Reverend Howard C. Olson

David A. Coughlin

Joseph Leonelli

Raymond J. Pettine

Omer A. Sutherland

Miss Ruth Thomas

ALBERT J. McALOON

Executive Secretary

October 9, 1959

Mr. Martin Silverstein
 Max Silverstein & Son
 344 South Water Street
 Providence 3, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

One Kind of Woman—By Ralph Dean, Paperback,
 Beacon Book

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON

Albert J. McAlloon

Executive Secretary

AJMc/nlw

[fol. 113]

RHODE ISLAND COMMISSION ON YOUTH

ROOM 626

49 Westminster Street
Providence 3, R.I.

Telephone Ga 1-6429**JOSEPH A. SULLIVAN**

Chairman

Rabbi Abraham Uhill

Reverend Edward H. Flannery

Reverend Howard C. Olsen

David A. Coughlin

Joseph Leonelli

Raymond J. Pettine

Omer A. Sutherland

Miss Ruth Thomas

ALBERT J. MCALOON

Executive Secretary

October 27, 1959

Mr. Martin Silverstein

Max Silverstein & Son

344 South Water Street

Providence 3, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

Peril

—November, 1959, Vol. 3, No. 5.

Adam

—Monthly, No date indicated
Vol. 3, No. 10.

Secret Life Confessions—Dec./59, Vol. 1, No. 1.

Shack Woman

—By Kathie Reed, Paperback,
Beacon Book

Only The Bed - By Don Holliday, Paperback
Midwood (tower) Publication.

Secret Confessions - Nov. 59, Vol. 2, No. 5.

Thank you for your cooperation.

Sincerely yours,

/s/ ALBERT J. McALOON
Albert J. McAloon
Executive Secretary

AJMc nlw

[fol. 114]

RHODE ISLAND COMMISSION ON YOUTH

ROOM 626

49 Westminster Street
Providence 3, R. I.

Telephone Ga 1-6429

JOSEPH A. SULLIVAN

Chairman

Rabbi Abraham Chill

Reverend Edward H. Flannery

Reverend Howard C. Olsen

David A. Coughlin

Joseph Leonelli

Raymond J. Pettine

Omer A. Sutherland

Miss Ruth Thomas.

ALBERT J. McALOON

Executive Secretary

December 30, 1959

Mr. Martin Silverstein

Max Silverstein & Son

344 South Water Street

Providence 3, Rhode Island

Dear Mr. Silverstein:

The following publications, by a majority vote of the Commission, have been found objectionable for "distribution for, or selling to, youths under 18 years of age."

Modern Man -- December 1959, Vol. VIII
No. 18-20

Golden Tramp -- By Doorna Winston; Beacon Book,
Paperback novel

Thank you for your cooperation.

Sincerely yours,

/s/ **ALBERT J. McALOON**
Albert J. McAlloon
Executive Secretary

AJMe/nlw

[fol. 115]

PETITIONER'S EXHIBIT 13

RHODE ISLAND COMMISSION ON YOUTH
 49 Westminster St. R. 626
 Providence 3, Rhode Island

August 10, 1959

The following publication(s) have been, by a majority vote of the Commission, found objectionable for distribution or sale to youths under 18 years of age".

Thank you for your cooperation.

Sincerely yours

Albert J. McAloon
 Executive Secretary

- Out of Darkness—Lenny Bass, paperback by Saber Book Co.
- One Violent Year—Ralph Brandon, paperback by Fabian Original
- Love Starved Wife—William Vanover, paperback; Bedside Books, Inc.
- Modern Man, August '59, Vol. 111, issue. Magazine

[fol. 116]

PETITIONER'S EXHIBIT 14

RHODE ISLAND COMMISSION ON YOUTH
 49 Westminster Street
 Providence 3, Rhode Island

The following publication, by a majority vote of the Commission, has been found objectionable for "distribution for, or selling to, youths under 18 years of age".

The Bramble Bush—Charles Mergendahl
 Paperback edition, Bantam Books

Thank you for your cooperation.

Sincerely yours

/s/ ALBERT J. MCALOON
 Executive Secretary

[fol. 117]

PETITIONER'S EXHIBIT 15

RHODE ISLAND COMMISSION ON YOUTH
ROOM 62649 Westminster Street
Providence, Rhode Island

Telephone Ga 1-6429

JOSEPH A. SULLIVAN
ChairmanALBERT J. MCALOON
Executive Secretary

August 30, 1957

Rabbi Abraham Chill
Reverend Edward Flannery
Reverend Howard Olsen
Clarence Sherman

Mr. Max Silverstein
Max Silverstein & Son
344 Water Street
Providence, Rhode Island

Dear Mr. Silverstein:

The following two (2) magazines have been found objectionable for "sale, distribution or display for youths under 18 years of age."

Monsieur—September 1957, Vol. No. 4, Published monthly by Monsieur Publications, 801 Palisades Avenue, Union City, New Jersey.

Cabaret —September 1957, Vol. III, No. 4, Published monthly by Entertainment Publications, Inc.
Not ours— 8150 No. Central Park Avenue, Skokie, Illinois.

Thanking you for your past cooperation, I am,

Sincerely yours,

/s/ ALBERT J. MCALOON
Albert J. McAloon
Executive Secretary

nlw

[fol. 118]

**RHODE ISLAND COMMISSION ON YOUTH
ROOM 626**

**49 Westminster Street
Providence 3, R. I.**

Telephone Ga 1-6429**

**JOSEPH A. SULLIVAN
Chairman**

**ALBERT J. McALOON
Executive Secretary**

February 18, 1960

Rabbi Abraham Chill
 Reverend Edward H. Flannery
 Reverend Howard C. Olsen
 David A. Coughlin
 Joseph Leonelli
 Raymond J. Pettine
 Omer A. Sutherland
 Miss Ruth Thomas

Mr. Martin Silverstein
 Max Silverstein & Son
 2 Lancaster Street
 Providence 6, Rhode Island

Dear Mr. Silverstein:

The following publications have been, by a majority vote of the Commission, found objectionable for "distribution for, or selling to, youths under 18 years of age."

Draw 800—Off Sale

SECRET CONFESSIONS—February/60, Vol. 2, No. 8.

Not Distributed

TRUE LIFE/SECRETS —March/60, Vol. 6, No. 44.

Thank you for your cooperation.

Sincerely yours,

/s/ **ALBERT J. McALOON**
Albert J. McAloon
Executive Secretary

AJMc/nlw

[fol. 119]

PETITIONER'S EXHIBIT 16

RHODE ISLAND COMMISSION ON YOUTH
ROOM 626
49 Westminster Street
Providence 3, Rhode Island

Telephone Ga 1-6429

Joseph A. Sullivan
Chairman

Albert J. McAloon
Executive Secretary

Rabbi Abraham Chill

Reverend Edward Flannery

Reverend Howard Olsen

Clarence Sherman

NEWS LETTER

OBSCENITY DEALTH BLOW BY RECENT SUPREME COURT
DECISION

The United States Supreme Court on June 24, 1957 made an historic decision in declaring that obscenity can be defined. The old guide followed by previous Courts was "material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." The new standard is "Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interests."

Justice Brennan declared in part, "This rejection (obscenity) is mirrored in the unusual judgment that obscenity should be restrained, is reflected in an international covenant of 50 nations; in obscenity laws of every one of the 48 states, and in all 20 obscenity laws enacted by the U. S. Congress between 1842 and 1956."

He further declared, writing for the majority, "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. But

implicit in the history of the First Amendment is the rejection of obscenity as utterly without social importance."

The new standard "prurient interests" applies to all, not just the so-called susceptible. It thus gives to the local community the right and responsibility of promoting better literature and of enforcing existing laws through legislative and legal channels.

UNITED STATES CONGRESS

Several bills were before the 1957 Congress which would have strengthened our Federal laws concerning obscene publications and modes of transportation. They failed to passage this session, but will be reintroduced. We will alert you to their numbers and contents in the future. Your written request for passage of good Federal legislation will definitely help them to pass. Urge your Congressmen to work for passage of laws relating to the sale and distribution of obscene materials.

[fol. 120] SUGGESTED READING:

Obscenity And The Law

Norman St. John-Stevens

Seeker & Warburg

A broad historical, chronological view of law and obscenity ranging from England, the Commonwealth nations to the United States. Most informative, with intelligent recommendations.

The Freedom To Read

McKeon, Merton, Gellhorn

R. R. Bowker Company, New York

This is a report of a lawyer, philosopher and sociologist on the theory of censorship. Highlights the dangers, points to need for further and continuous study in this field. An interpretive study requiring close attention in reading.

The Hidden Persuaders

Vance Packard

McKay Publishing Co., New York

An introduction to new (old) world of symbol manipulation. Fascinating reading of what the 'ad' boys of Madison Avenue are doing and can do to the unsuspecting public.

NEWS NOTES

Formation and organization of the Churchmen's Commission for Decent Publications, representing over 20 Protestant groups was announced in Washington, D. C., September 19, 1957. This group will give leadership in coordinating Protestant efforts against pornography. For those interested in contacting this group write to:

Churchmen's Commission For Decent Publications
311 Western Union Building
1405 G. N. W.
Washington 5, D. C.

Those interested in obtaining lists of acceptable pocket books for youths write to:

National Office For Decent Literature
33 E. Congress Parkway
Chicago 5, Illinois

Your Commission has reviewed 38 publications. They have found by a majority vote 32 to be totally objectionable for youths under 18. The lists have been sent to distributors and police departments. To the present cooperation has been gratifying.

[fol. 121] If you are interested in the Rhode Island law governing this field, or the most recent Supreme Court decisions, write to us for free copies.

We welcome your visitation for perusal of the publications and discussion on this matter, so that a clear, unbiased perspective may be obtained in this very important field of endeavor. The following is the list of publications found objectionable, by majority vote, for "sale, distribution or display for youths under 18." If you see new issues on the stands, we recommend that you speak to the manager. If no progress is made, send the issue(s) to us for review.

CABARET	—July 1957
MODERN MAN	—July 1957
GENT	—August 1957
JEM	—August 1957, Vol. 1, No. 6
SCAMP	—Vol. 1, No. 3, September 1957
ADAM	—No month indicated, Vol. 1, No. 8
PICTURE DIGEST	—October 1957, Vol. 31, No. 2
ADAM	—No month indicated, Vol. 1, No. 9
GALA	—September 1957, Vol. 8, No. 3
DARE	—August 1957, Vol. 2, No. 9
CABARET	—September 1957, Vol. III, No. 4
MONSIEUR	—October 1957 on cover, Sept. 1957 inside, Vol. 1, No. 4
PARIS LIFE	—December 1957, Vol. 1, No. 31
AFTER HOURS	—No month indicated, Vol. 1, No. 3
ADAM	—No month indicated, Vol. 1, No. 10
SCAMP	—November 1957, Vol. 9, No. 10
NIGHT & DAY	—October 1957, Vol. 9, No. 10
JEM	—December 1957 on cover, Nov. 1957 inside, Vol. 1, No. 7
MODERN MAN	—October 1957, Vol. VII, No. 4-76
ADAM	—1957 Annual
TOMCAT	—No date indicated, Vol. 1, No. 4
21	—Annual 1956-57
FOLLIES	—November 1957, Vol. 2, No. 6
GALA	—November 1957, Vol. 8, No. 4
ADAM	—No month indicated, Vol. 1, No. 11
PEYTON PLACE	—Grace Metalious, hard or paper- backed publications.

TRUE LIFE SECRETS	—December 1957, Vol. 1, No. 35
LAFF ANNUAL	—Winter 1957
GLAMOR PARADE	—December 1957, Vol. 2, No. 3
FROLIC	—December 1957, Vol. 7, No. 3
FOLLIES	—January 1958, Vol. 3, No. 1
MODERN MAN	—Quarterly, Vol. 8

[fol. 122]

RESPONDENT'S EXHIBIT A

**ANNUAL REPORT
OF
RHODE ISLAND COMMISSION TO
ENCOURAGE MORALITY IN YOUTH
TO
THE HONORABLE GOVERNOR AND
THE GENERAL ASSEMBLY
JANUARY, 1960**

The Rhode Island Commission to Encourage Morality In Youth held 21 Board Meetings with a two-hour average period of time spent on Commission matters in each session, and 12 special meetings, five of which were to (1) meet with the Administrator, Division of Alcoholic Beverages in regard to juvenile buying and drinking liquor; (2) discuss Rhode Island Drive-In Theatres with owners and managers; (3) explain the newly passed Rhode Island Law on Obscenity to the public; (4) to retailers of publications; (5) to all local distributors.

From January, 1959 to January, 1960 there was a total of 84 public lectures. A speakers' bureau is maintained through the courtesy of the nine Commission members, and the Executive Secretary. We were fortunate in receiving requests for speakers from various types or organizations and in the several Counties of Rhode Island, thereby reaching a great number of the Rhode Island public.

One hundred and fifty Christopher Sex Education Records were distributed to groups and to interested adults with our compliments, state-wide.

[fol. 123] Distribution of over thirty thousand pieces of material pertinent to the Commission's immediate and broad aims, relating to family life, literature and community organization was of major import.

At the request of adults and organizations, the Commission distributed 500 copies of "A Parents' Guide to Children's Reading" by Naney Larriek. This is one of the finest handbooks on children's reading; highly recommended by the American Book Publisher's Council.

Nearly a thousand copies of a comprehensive movie evaluation bulletin, "The Green Sheet," sponsored by the Motion Picture Council of America and nine nationally known cultural organizations is sent out or given away monthly. Special articles on health, education, physical fitness, and related subjects are distributed as the occasion arises.

The second Annual Clarence E. Sherman Award for 1959 will be given to Mrs. Eleanor M. Johnson, Administrator, R. I. State Bureau of the Blind, for her personal interest and diligence in maintaining a high literary level on the stands conducted through her department.

Thirty magazines and paperback pocketbooks were added to the previous list of publications found objectionable for youth under 18 by a majority vote of the Commission. This brings the total to 108.

The guide lists (requested by chiefs of police; distributors and educators in 1957) of the type of publications deemed objectionable for youth under 18 is still sent to all local [fol. 124] distributors and chiefs of police in Rhode Island, with the result that in the last six months our newsstands show a very improved condition.

In most cases local distributors have been cooperative this year, withdrawing publications of the type listed in the Commission guide list and returning them to publishers.

This Commission feels that the guide list, Court action initiated by this Commission, and the cooperation of the Attorney General's Department is largely responsible for the "new look" on Rhode Island newsstands.

The new Rhode Island Obscenity Law, Chapter No. 86* passed by the Legislature and signed by Governor Del Sesto in May, 1959, was instrumental in the initiation of Court action by this Commission and the injunctive relief initiated by the Attorney General against three Newport retailers of publications. Judge Licht, Superior Court, Newport, Rhode Island, ruled three of the six publications sold by the retailers obscene and restrained them from selling the publications named in his decision.**

Along with the passage of Chapter No. 86, Rhode Island Obscenity Law, the Legislature passed and Governor Del Sesto signed into law an amendment to this Commission's charge of duties as follows: "It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in [fol. 125] Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigation situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

Judge Frost, Rhode Island Supreme Court, ruled that the State Law against selling Obscenity to youth is clearly drawn and does not violate either state or federal constitu-

* See Appendix A

** See Appendix B

' See Appendix C

tional guarantees of free speech, free press and due process of law.*

These are steps forward in the State of Rhode Island, through the Courts, against obscenity. In this fight the Commission to Encourage Morality in Youth has played its part. However, with all of the above cooperation, it is imperative that this Commission keep alert to old and new titles cropping up on local newsstands as we know that upwards of 10,000 different titles are published monthly.

In September, 1959, because of the many complaints from outraged parents at the type of films being shewn at the Rhode Island Drive-Ins and also the lack of teen-age supervision while parked, this Commission initiated and completed a survey on the Drive-In Theatres in the State. High points of the survey note that there are 11 (2) Drive-in theatres in Rhode Island which operate through summer months and remain open until November and then for week-ends during the winter, providing car-heaters.

That six of the Drive-In Theatres like to be known as Family Theatres, while five show adult films apparently without regard to the age of their viewers. It was claimed that all Drive-Ins are patrolled by local police and ushers who are alerted "when" teen-age occupants are noted in attending cars.

That Drive-In Theatres, a social phenomenon, clearly present to parents and managers a challenge to their parental duties and to public morality. The quality of films is of paramount importance since there is no discrimination between adult and juvenile viewers.

That the susceptibility of impressionable teen-agers to imitate the glamorous, or what passes for glamor, poses for parents and managers the duty to recognize that the setting of a Drive-In is quite different from that of a living room, or of a downtown theatre.**

* See Appendix D

** See Appendix E

A similar survey of in-door theatres is now being conducted.

Acting on its power to investigate causes of delinquency, the Commission has met with several state officials for a discussion of juvenile drinking, the myriad and complex [fol. 127] causes of delinquency, and legal aspects of the Commission's operations. It also held a special meeting with Rhode Island police and legal officials in September, 1959, for a discussion on the extent of delinquency in Rhode Island and the possible formation of state-wide organization to combat it.

Words of commendation for the work of the Commission have been received from Mr. J. Edgar Hoover; Mr. John Goldwater, President of Comic Publishers Association of America; Mr. Thurman Arnold, former U. S. Assistant Attorney General to name but a few, while countless Rhode Islanders have bespoken their support of the Commission.

In summation, it may be said that the problem of obscenity available in Rhode Island has greatly diminished, but has not disappeared. We pledge our further efforts toward overcoming the remaining vestiges of literary obscenity and of expanding our activities to cope with the ever present challenge presented by our youth. Our legislative charge is clear. With public support we will fulfill it.

- Joseph A. Sullivan, Chairman
Rabbi Abraham Chill
The Reverend Edward H. Flannery
The Reverend Howard C. Olsen
David A. Coughlin
Joseph Leonelli
Raymond J. Pettine
Omer A. Sutherland
Miss Ruth Thomas

[fol. 128]

RESPONDENT'S EXHIBIT B

Rhode Island Commission On Youth

Minutes of Board Meeting, October 23, 1957

The Commission On Youth Board Meeting convened at 1:00 a.m., October 23, 1957. Those in attendance were: Mr. Joseph A. Sullivan, Chairman; Mr. Clarence Sherman, Rabbi Chill, Father Olsen and Mrs. Williams, who recorded the minutes.

The minutes of the last meeting were read and approved.

Mr. Sherman opposed the statement in the October 9th minutes that "please return in two days" be typed at the top of future ballots, noting that two days gave insufficient time to properly review books or magazines sent to the Commissioners. It was agreed that the Commissioners would return the ballots in as short a time as was possible.

Though Peyton Place, authored by Grace Metalious, has been voted objectionable by a majority of the Commission for sale, distribution or display for youths under 18 years of age, the Chairman remarked that a Mr. Horan, Director of the Rhode Island Training School for Boys, had purchased a copy from the Garden City, Cranston, Rexall Drugstore this date and that the rack was well stocked. Mr. Sullivan suggested calling the Cranston Chief of Police to inquire the reason Peyton Place was still being sold, distributed and displayed since the Police departments had been advised of the Commission's vote. If no action is taken, the next move would be to talk with the Attorney General's Office.

The Chairman noted that he had been approached to speak at De LaSalle, Newport, in the near future.

Rabbi Chill stated that his speaking engagement at the [fol. 129] Roger Williams Junior High School was very

successful and that a definite effort should be made to secure speaking engagements at high schools, and set forth the following motion: That before the Easter Holiday, this office make every effort to get each and every Senior High School in the State of Rhode Island to be addressed by some one of this Commission. Seconded by Mr. Sherman, motion was carried.

The Chairman suggested that whenever Mr. McAlloon has an engagement to speak in public, it might be a good idea for the office to notify the Commissioners so that one of them might have the opportunity to attend. Father Olsen stated that the talk given by Mr. McAlloon at the Warwick Rotary Club was excellent.

Mr. Sherman stated that the accomplishments of the Commission should be forthcoming at this time more so than last spring, and that the preliminaries should be a re-evaluation of what has been done from this office since March 1957.

The Chairman remarked that he had requested Mrs. Williams to keep a day by day office log, which she had started, and wanted the Commissioners to feel free to look at it at any time.

It was noted, since fewer adults had come into the office to review the proscribed magazines, that the Journal had hurt rather than helped, but that there had been an improvement in public relations in spite of the newspaper.

The Chairman stated that it would be a definite help for Board Members to visit the office during the week, and also expressed the desire to have the Executive Secretary and the entire Board present at the next regular meeting. The meeting adjourned at 11:45 a. m.

[fol. 130]

RESPONDENT'S EXHIBIT C

RHODE ISLAND COMMISSION ON YOUTH
BOARD MEETING, OCTOBER 9, 1957

AGENDA

Discussion on:

1. Advisability of another meeting with Attorney General and Police.
2. Lawyer Charles McLaughlin's offer to diagram all 48 States' laws on obscenity.
3. Advisability of news letter from this office.
4. Code formulation.

[fol. 131] Rhode Island Commission On Youth

Minutes of Board Meeting, October 9, 1957

The Commission on Youth Board Meeting convened at 11:05 a. m., October 9, 1957. Those in attendance were: Mr. Joseph A. Sullivan, Chairman; Mr. Clarence Sherman, Father Flannery, Father Olsen, Rabbi Chill, Mr. Francis J. Fazzano, Assistant Attorney General; Mr. Albert J. McAloon, Executive Secretary; and Mrs. Williams, Office Stenographer, who recorded the minutes of the meeting.

The minutes of the last meeting were read and approved.

Mr. McAloon reported that he had spoken to the faculties of the Warwick Senior and Junior High Schools, the Warwick Rotary Club and was to speak today at the Woonsocket Lions Club.

Mr. McAloon stated that the promoters of the Pawtucket Children's Book Fair had approached him on the feasibility of participating in it. Mr. Sherman stated that if we could accentuate our work it might be worthwhile. Mr. McAloon was to work out details if feasible. Mr. McAloon remarked that he had ten radio scripts prepared for the Commission's review, and that WPRO-TV would like to have an outline of a suggested TV program in two weeks. Mr. Sherman cautioned that we should keep our eye on our aims, primarily in this field, since station managers want good speakers but are not always concerned about primary aims.

[fol. 132] Mr. Laurent C. Bilodeau, Attorney from Woonsocket, visited the office to discuss the police action in regard to magazines in Woonsocket. He stated that the Woonsocket police were picking up magazines listed by the Commission and others not so proscribed. Mr. McAloon explained to Mr. Bilodeau that this was a local problem and that we could do nothing about the police action.

Rabbi Chill referred to his motion that was made and carried at a previous meeting to approach the distributors about reviewing magazines before they were placed on newsstands, as to what action had been taken. Mr. McAloon stated that he had visited a distributor who said that he would agree if his publishers would agree. Another said that he had two shipments a week, of about 150 magazines each, and that he did not have time to go through them. Mr. McAloon stated that if the Commissioners could review the books and return them to the distributor within two or three days, so that he might put them on the stands at the proper time, the problem might be solved, but that the problem was how fast the Commission could work. This was deemed impractical as each magazine issue had to be re-checked and some were issued weekly. Mr. Fazzano remarked to the effect that the progress of the Commission to date was commendable and probably due to our educational approach. He stated that we cannot demand the distributors to give us magazines for review. If we could prove that the distributor intended to flout the law, we could proceed with court action.

[fol. 133] Mr. McAloon stated that wholesalers, police and city solicitors all have copies of our law and of the recent Supreme Court laws.

Rabbi Chill noted that by the time the Commission reviews the books and the votes returned the damage had been done as the distributors had already had time to place all magazines on stands for sale before the list was received by them.

Father Flannery suggested that for the next meeting, Mr. McAloon try to find out what percentage of the books that are given to them are sold from the time they receive them, until the time the police get around.

Mr. McAloon stated that the office had received several calls about obscene magazines for sale at the Hillsgrove Airport, but that people do not realize that each issue had to be reviewed which was a difficult task. Father Flannery noted that he had been called about magazines proscribed by the Commission remaining on sale after lists had been sent to distributors and police, to which Mr. McAloon suggested that it could be that the same magazines were seen, but that it probably was not the same edition proscribed by the Commission.

Father Flannery questioned the state-wide compliance by the police, or anyone else, to get the proscribed magazines off the stands. Mr. McAloon showed the Commissioners the questionnaires sent to the chiefs of police from this office and returned to us.

Mr. McAloon was named by the Chairman to probe into the problem more deeply for the next meeting.

[fol. 134] Mr. Sherman felt that the ultimate end of cleaning house was for the publishers to have some code of their own as they did in the comic book field, worked out on a friendly basis.

Mr. McAloon stated that there were only six distributors in Rhode Island and that there were some magazines on stands that were not sold by any of the local distributors, so that it was logical to suppose that the magazines were brought into the State by private carrier.

Mr. Sullivan requested travel expenses be forwarded to the office.

Mr. Sullivan requested a speed-up in returning votes on the publications reviewed, and that "Please return in two days" be typed at the top of future ballots.

In regard to the *question* as to whether or not to have another meeting with the Attorney General and police chiefs, Mr. McAloon felt that we could present a program for the Attorney General and police which would aid the Commission in developing plans for the future.

Mr. McAloon suggested that a newsletter, perhaps on a quarterly basis, be issued from this office to lawyers, educators, social workers, PTA's, etc. It was agreed that such a release could serve a good purpose of general and specific information, alerting the community to our continued existence and progress.

The Chairman expressed his and the Commission's appreciation to Father Flannery for the coverage of the obscene literature problem by the Providence Visitor.

There being no further business the meeting was adjourned at 12:00 noon.

[fol. 135]

SUPERIOR
IN THE ~~SUPREME~~ COURT OF RHODE ISLAND

M.P. No. 5139

BANTAM BOOKS, INC., et al.,

—vs.—

JOSEPH A. SULLIVAN, et al., in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH, et al.

DECISION—February 14, 1961

MACKENZIE, J. This is a petition which has been brought under the Uniform Declaratory Judgments Act (*Title 9,*

Chapter 30, General Laws of Rhode Island, Edition of 1956, as amended). The petitioners are four New York corporations; they are publishers of paper bound books which are and have been for a long period of time distributed in the State of Rhode Island. The respondents are the present [fol. 136] members and the executive secretary of the Rhode Island Commission to Encourage Morality in Youth, hereinafter sometimes referred to as the Commission. The said Commission was created pursuant to *Resolution No. 73* adopted at the January, 1956, Session of the Rhode Island General Assembly and approved April 26, 1956. The said Resolution was amended by S. 444 of the General Assembly on May 25, 1959.

The said S. 444 amended the sixth paragraph of Resolution No. 73 to read as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

There appears to be little dispute as to the facts in this case. About a year after the Commission was created in [fol. 137] 1956 it sent notices to various book and magazine distributors, including Max Silverstein & Sons (hereinafter sometimes referred to as "Silverstein") of 344 Water Street, Providence, who at the time was and for a long time had been the distributor in the Providence area for the petitioners. Several of the notices which Silverstein received from the Commission were introduced into evidence.

(Petitioners' Exhibits "1" to "16", inclusive). The notices informed Silverstein that certain books and magazines, listed therein and distributed by him, had been reviewed by the Commission and that by majority vote the Commission had declared them to be objectionable for sale, distribution or display for youths under eighteen years of age. The first of the notices (Petitioners' Exhibit "1") also contained the following language:

"The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.

"The Attorney General will act for us in cases of non-compliance.

"The Commissioners trust that you will cooperate with this agency in their work. * * *

[fol. 138] Another notice received by Silverstein from the Commission included the following language:

"Your cooperation in removing the listed and other objectionable publications from your newsstands will be appreciated. Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department" (Petitioners' Exhibit "11")

Petitioners' Exhibit "6" is a notice received by Silverstein from the Commission with reference to *Peyton Place*, a paper bound book published by one of the petitioners, and Petitioners' Exhibit "14" is a similar notice with reference to *The Bramble Bush*, a paper bound book published by another of the petitioners.

Joel Kaplan, manager of Silverstein & Sons, testified that after receiving each notice from the Commission his company accepted no more orders for the publications listed, stopped selling the copies it had, and instructed its men to pick up all unsold copies from its retail customers. The witness testified that his company did all this rather than

face court action. In cross-examination the witness testified [fol. 130] that he had attended a meeting which had been called by the Commission, at which meeting he said his company agreed to cooperate with the Commission. On re-direct examination he stated that he had agreed to co-operate with the Commission because the Commission was duly authorized under law and they did not want to be involved in any litigation, or words to that effect.

He also testified that shortly after his company received each notice it would be visited by a member of the Providence Police Department who wanted a report on what action Silverstein had taken as to the books and magazines listed in that notice. The police officer wanted the number of copies originally received from the publisher, the number that had been reclaimed from the retailers and the number that had been returned by Silverstein to the publishers. (See pencilled notations on Petitioners' Exhibit "7").

The petitioners contend that said *Resolution 73*, as amended, and also the action taken by the members of the Commission are unconstitutional because they are in violation of the provisions guaranteeing freedom of the press. (First Amendment, Constitution of the United States; Section 1 of the Fourteenth Amendment, Constitution of the United States; Article 1, Section 20, Constitution of [fol. 140] Rhode Island.) The petitioners concede that the constitutional guarantee of freedom of the press does not extend to obscene publications.

Roth v. United States, 354 U.S. 476 (1956)

They do maintain, however, that since the suppression of a publication which is not obscene would be a violation of the constitutional guarantees, the determination of whether such publication is or is not obscene is one which must be made by the courts in accordance with due process of law, and not one which may be made by the respondent Commissioners.

The problem of obscenity and how best to deal with it is one which has been with us for a very long time and to which many people have devoted a great amount of study.

There have been numerous instances over the years of persons who have become extremely zealous in their attempts to stamp out what they considered obscenity in one form or another. To spell out the names of a number of books which have been the recent subjects of litigation in this field would merely give additional publicity to the type of literature which some of the respondent Commissioners consider obscene. Suffice it to say that even after court trials there is often no uniformity as to what is [fol. 141] obscene. The novel "*Memoirs of Hecate County*" was found to be obscene in New York.

Doubleday & Co., Inc. v. New York, 335 U.S. 848 (1948)

Yet a bookseller indicted for selling the same book was acquitted in California. The Book "*God's Little Acre*" was held to be obscene in Massachusetts, but not obscene in New York and Pennsylvania.

The mere fact that the problem of obscenity is with us does not mean, however, that we should disregard our constitutional safeguards. Obscenity is not on trial in the case before us. What is at issue is the Resolution which created the Commission and the actions which have been taken by the respondents in carrying out their purpose.

Mr. Chief Justice Warren, in his concurring opinion in the *Roth* case, *supra*, said:

"That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight states as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem."

Roth v. United States, 354 U.S. 476, 495 (1956)

[fol. 142] The respondents take the position here that they have not "banned" any of the books and magazines listed, that they have merely "advised" the distributors and dealers, and that the withdrawal of the books and magazines from circulation has been done voluntarily by Silverstein

and the other distributors and dealers. The respondent McAloon testified in cross-examination that after the Commission sent out its notices that certain publications were objectionable it "took no official concerted action" to follow up to see what steps the distributors took. Yet, we have the undisputed evidence that copies of all notices were sent to the chiefs of police, the uncontradicted testimony of the witness Kaplan that he was visited regularly by a representative of the Providence Police a few days after the receipt of each notice to find out what action he had taken, and we have the statement in the Commission's Report of 1960 to the Governor and the General Assembly, stating in part:

"In most cases local distributors have been cooperative this year, withdrawing publications of the type listed in the Commission guide list and returning them to publishers." (Italics by the Court)

All of this is inconsistent with the testimony of Mr. McAloon that the Commission did nothing to find out what [fol. 143] the distributors did after they received the notices.

To say that the action taken by the distributors was voluntary is unrealistic. Here we have notices sent out on letterheads entitled Rhode Island Commission on Youth informing the distributor that this official, public agency, "established by legislative order in 1956" (Petitioners' Exhibit "I") had made a finding that certain books and magazines being sold and delivered by the distributor were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.

"The Chiefs of Police have been given the names of the aforementioned magazines *with the order that they are not to be sold.*" (Petitioners' Exhibit "I") (Italics by the Court)

Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of the various

cities and towns. Yet the respondent McAlloon would have us believe that the books and magazines were not "banned" by the Commission, and that the distributors voluntarily [fol. 144] cooperated with the Commission. The effect of the notices sent out by the Commission was clearly intimidation. The witness Kaplan testified that Silverstein, upon receiving the notices from the Commission, immediately did four things: (1) refused to take any new orders for the proscribed publications; (2) ceased selling any of the copies on hand; (3) withdrew from the retailers all unsold copies; and (4) returned all unsold copies to the publishers. He stated that this was all done because they did not want to become involved in litigation. His testimony was clear and convincing.

Petitioners' Exhibit "1" also states:

"The Attorney General will act for us in cases of non-compliance".

What can these words possibly mean to the distributor? They can only mean:

"If you fail to comply with this letter by removing from circulation those magazines or books listed herein, you will be prosecuted by the Attorney General."

This Court can find no other reasonable interpretation of that language.

Language in other notices (e.g. Petitioners' Exhibit "11") carries the same threat in the following language:

[fol. 145] "• • • Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department".

As another Court said in a similar case:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence

in their opinion by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

American Mercury, Inc. v. Chase, et al., 13 Fed. (2) 224, 225 (1926)

In another case we find the following language:

"Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive ***. True, as the prosecutor says by way of defense, there was no actual compulsion or threat in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received."

Bantam Books, Inc. v. Melko, 25 N. J. Superior 292 (1953); modified 14 N. J. 524 (1954).

[fol. 146] There is no question but that the activities of the respondents have resulted in the suppression of the sale and circulation of books without any judicial determination as to whether or not they are obscene. The sending of these notices with their implicit threats of criminal prosecution are clear violations of the constitutional provisions guaranteeing freedom of the press.

Contrary to the contention of the respondents in their brief, the petitioners here are not seeking an injunction so as to furnish them with "unlimited license to publish and distribute obscene publications in this State". The petitioners desire freedom to publish, as guaranteed to them by the above cited sections of the constitutions of the

United States and Rhode Island, knowing full well the consequences of their acts if they violate the criminal laws by the publication of obscene books and periodicals.

Let us examine the sixth paragraph of *Resolution No. 73*, as amended, to find out the duties of this Commission. The Substance of that paragraph is:

"It shall be the duty of said Commission to educate the public concerning any book, * * * containing obscene, * * * language, as defined in Chapter 11-31 [fol. 147] * * *, and to investigate and recommend the prosecution of all violations of said sections, * * *"

Is it possible that even though the actions of the Commission have been violations of the constitutional guarantees, the Resolution itself may be valid? Can there be such "education" of the public without the accompanying implicit threat of criminal prosecution to the distributors and book sellers who refuse to accept the rulings of the commission?

The duty of the Commission is to "educate the public" concerning books containing obscene language and "to investigate and recommend the prosecution of all violations".

It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The Resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal prosecution, the inevitable result is the suppression of books without a judicial determination as to whether or not they are obscene. The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island.

[fol. 148] Is the fact that a member of this Court is in "considerable doubt as to the constitutionality" of the Resolution sufficient to declare the Resolution unconstitutional? The question of the constitutionality of a legislative act

does not depend upon events which transpire after the adoption of the said act.

The Narragansett Electric Lighting Company v. Sabre et al., 50 R.I. 288, 303 (1929)

In the same case, our Supreme Court said:

" * * * We have frequently stated that one who attacks the constitutionality of an act of the Legislature has the burden of satisfying the court beyond a reasonable doubt that the act is invalid."

The Narragansett Electric Lighting Company v. Sabre, et al., supra, at page 298

There is no question but that the Superior Court may either certify constitutional questions to the Supreme Court or may determine them in the first instance.

Haigh et al. v. State Board of Hairdressing, et al., 74 R.I. 106 (1948).

Our Supreme Court in *Allen v. Rhode Island State Board of Veterinarians et al.*, 72 R.I. 372 (1947), stated at page 377.

[fol. 149] " * * * As a result of such method of amendment we point out, among other things, that a question concerning the constitutionality of a statute may now be determined, in the first instance at least, by any one of the eleven justices of the superior court and by every justice, assistant justice or clerk authorized to act as a justice of any one of the twelve district courts; that the determination of such question by one of those courts is not binding on the other; so that contrary conclusions on the same question might well be reached; that, in different cases raising the same question, different justices of the same court might decide the question in conflict with each other; and that, subject to the provisions of S6, as amended, unless a case involving a question of the constitutionality of a statute were brought to this court by appellate proceedings, the determination of such question by the superior or dis-

trict courts would stand only for the case in which it was made and therefore would not bind all the people of this state."

The Supreme Court of New Jersey wisely stated:

" * * * the better practice is for the inferior court to assume that an act is constitutional until it has been passed upon by the appellate court, unless it is so clearly in contravention of the constitution that there can be no reasonable doubt about it, which does not apply to the statute under consideration."

Legg v. Passaic County, 122 N.J.L. 100; 4 A.2d 300 (1939)

[fol. 150] In view of the above, it appears to this Court that it would be better practice to leave the matter of passing upon the constitutionality of *Resolution No. 73*, as amended, to our Supreme Court.

The petitioners' petition for a declaratory judgment is granted. A decree may be presented (1) declaring constitutional *Resolution No. 73*, as amended; (2) declaring unconstitutional the acts of the respondents in disseminating the above-described notices, their being in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article 1, Section 20, of the Constitution of Rhode Island; (3) permanently enjoining the respondents from continuing the dissemination of such notices.

[fol. 151]

IN THE SUPERIOR COURT OF RHODE ISLAND

M. P. No. 5139

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC. and THE NEW AMERICAN LIBRARY
OF WORLD LITERATURE, INC., Petitioners,

—against—

JOSEPH A. SULLIVAN, ABRAHAM CHIEN, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT McALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH, Respondents.

DECREE—Filed March 3, 1961

This cause came on to be heard on the Petition of Bantam Books, Inc., Dell Publishing Company, Inc., Pocket Books, Inc., and The New American Library of World Literature, Inc., praying for a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956, as amended), wherein the Petitioners seek to have Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, as amended, declared unconstitutional, and wherein the Petitioners seek to have certain actions of the Respondents declared unconstitutional. After hearing thereon, arguments of counsel, and written Briefs, the following findings of fact are made:

[fol. 152] 1. The Petitioners, four New York corporations, are publishers of paper bound books, which are and have been for a long period of time distributed in the State of Rhode Island.

2. The Respondents are the present members and the Executive Secretary of the Rhode Island Commission to Encourage Morality in Youth.

3. The said Commission was created pursuant to Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, and approved April 26, 1956. The said Resolution was amended by S444 of the General Assembly on May 25, 1959.

4. The Respondents sent notices to various book and magazine wholesale distributors and retailers in the State of Rhode Island; some of which notices are Petitioners' Exhibits "1" to "16" inclusive.

5. The said notices informed said book and magazine wholesale distributors and retailers that the books and magazines listed thereon had been reviewed by the Commission, and that by majority vote the Commission had declared them to be objectionable for sale, distribution or display for youths under eighteen years of age.

6. Petitioners' Exhibit "6" is such a notice sent by Respondents with reference to "Peyton Place", a paper bound book published by Petitioner Dell Publishing Company, Inc., and Petitioners' Exhibit "14" is a similar notice with reference to "The Bramble Bush", a paper bound book published by Petitioner, Bantam Books, Inc.

7. Copies of said notices were sent by Respondents to the Chiefs of Police of the various cities and towns in the State of Rhode Island.

[fol. 153] 8. The effect of the said notices were clearly to intimidate the various book and magazine wholesale distributors and retailers and to cause them, by reason of such intimidation and threat of prosecution, (a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers.

9. The activities of the Respondents have resulted in the suppression of the sale and circulation of the books listed in said notices without any judicial determination as to whether or not they were obscene.

10. The sending of said notices by Respondents, with their implicit threat of criminal prosecution, is a clear violation of the constitutional provisions guaranteeing freedom of the press, as set forth in Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article 1, Section 20, of the Constitution of Rhode Island.

11. Though there is considerable doubt as to the constitutionality of Resolution No. 73, as amended, it would be better practice to leave the matter of passing upon the constitutionality of said Resolution No. 73, as amended, to the Supreme Court, for the reasons set forth in the written Decision of this Court:

Wherefore, it is hereby Ordered, Adjudged and Decreed:

1. That Resolution No. 73, as amended is constitutional.

2. That the acts of the Respondents in disseminating said notices concerning books and publications are hereby declared unconstitutional.

3. That Respondents, and each of them, their agents, servants, and employees, and their successors in office, be and they are hereby permanently enjoined from directly [fol. 154] or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances.

Entered as the Decree of this Court this 3rd day of March 1961, A. D., 1961.

Per Order: Thomas A. Palangio, Ass't Clerk.

Enter: Mackenzie, J., 3/2/61.

aggrieved by the said decree and claims this their appeal therefrom and move that this Honorable Court fix the time within which said respondent shall file his reasons of appeal, transcript of evidence, etc.

By his Solicitors,

J. Joseph Nugent, Attorney General, Joseph L. Breen, Special Counsel.

[fol. 159] It is hereby ordered that reasons of appeal and the transcript of evidence, etc., be filed in the Office of the Clerk on or before the 21st day of April, A.D. 1961.

Mackenzie, J., Justice of the Superior Court

3/30/61

Request is hereby made of the court stenographer by the respondent for a transcript of the entire evidence, rulings, etc. of the Trial Justice in the hearing in the above entitled cause.

J. Joseph Nugent, Attorney General, Joseph L. Breen, Special Counsel.

The State of Rhode Island shall pay for the transcript, upon presentation of the bill by the stenographer, in accordance with the voucher procedure established law.

Mackenzie, J., Justice of the Superior Court

3/30/61

[fol. 160]

IN THE SUPERIOR COURT OF RHODE ISLAND

(Title omitted)

REASONS OF APPEAL—Filed April 20, 1961

Whereas by decree entered on the third day of March, A.D. 1961, the Superior Court in the above entitled cause granted a permanent injunction against the respondents in said cause; and

Whereas, within the time allowed by law, to wit, on the thirtieth day of March, A.D. 1961, the respondents claimed

an appeal therefrom by filing as written claim of appeal together with a request for the transcript and providing for the estimated cost of the transcript; and

Whereas the Superior Court fixed the twenty-first day of April, A.D. 1961, as the date for filing the Respondents Reasons of Appeal and the transcript of testimony in said cause,

Now therefore, the respondents come into court and file the transcript of the testimony taken in said cause and [fol. 161] the following reasons of appeal.

First: The said decree is against the law.

Second: The said decree is against the evidence.

Third: The said decree is against the law and the evidence and the weight thereof.

Fourth: The Trial Justice erred in certain rulings and in admitting certain evidence as shown by respondents exceptions as shown on pages 19, 23, 25, 33 and 37 of the transcript.

Respectfully, For the Respondents, J. Joseph Nugent, Attorney General of Rhode Island, By: Joseph L. Breen, Special Counsel.

Allowed

Cappelli, P. J.
May 10, 1961

[fol. 162]

IN THE SUPREME COURT OF RHODE ISLAND

Equity No. 2925.

BANTAM BOOKS, INC. et al.,

v.

JOSEPH A. SULLIVAN et al. As Members of the Rhode Island Commission To Encourage Morality in Youth.

OPINION—Filed December 20, 1961

COXDON, C.J. This is a ~~petition~~ to the superior court for a declaratory judgment under G. L. 1956, Chap. 9-30, otherwise known as the uniform declaratory judgments act. The cause is here on the petitioners' appeal from a decree denying a portion of the relief prayed for, and also on the respondents' appeal from such decree granting the petitioners certain other relief which they sought.

The petitioners are Bantam Books, Inc.; Dell Publishing Company, Inc.; Pocket Books, Inc. and The New American Library of World Literature, Inc.; all New York corporations engaged in the business of publishing paper-bound books but not in distributing them in this state. The respondents are the executive secretary and members of the Rhode Island Commission to Encourage Morality in Youth. The commission was created by the general assembly at its January 1956 session by resolution No. 73.

The resolution was amended on May 25, 1959 and as amended it charges the commission as follows:

[fol. 163] "It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in, chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said

commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

In the discharge of such duty as they construed it the commission compiled several lists of publications which upon investigation they deemed "completely objectionable for sale, distribution or display for youths under eighteen years of age" and notified distributors doing business within the state thereof. They also advised these distributors that the lists had been furnished to the police departments throughout the state. They asked for the cooperation of the distributors in removing the objectionable publications and stated that the receipt of such cooperation would eliminate the necessity of the commission recommending prosecution to the attorney general. As a result of such notices the distributor for Bantam Books, Inc. and Dell Publishing Company, Inc. returned a supply of certain paper-bound books published by them and stated the books could not be held for sale because they were listed by the commission as objectionable. The distributor did not object to the commission's action and is not a party to the instant proceedings. [fol. 164] In their petition petitioners alleged that Resolution No. 73 is an unconstitutional interference with the right of freedom of the press guaranteed by the first amendment to the federal constitution and made applicable to the states by the fourteenth amendment. They also alleged that it is violative of article 1, sec. 20, of the constitution of this state guaranteeing such freedom. The petitioners further alleged that as construed by the commission the resolution was unconstitutionally applied by them, that their actions thereunder should be declared null and void, and that they should be enjoined from continuing such acts.

The cause was heard by a justice of the superior court without a jury on petition, answer and oral proof as though it were a suit in equity. At the conclusion of the evidence the trial justice decreed (1) that the resolution was constitu-

tional, but (2) that the acts of respondents under their construction of it were unconstitutional in that they were in effect prior restraints of freedom of the press. On that ground they were (3) expressly enjoined by the decree from continuing such acts.

The petitioners contend that the trial justice erred in sustaining the constitutionality of the resolution. In support of such contention they argue that the same reasons upon which he based his finding that the commission's acts were unlawful were equally applicable to the resolution itself. On the other hand respondents, under their appeal, contend that their acts were in accordance with the authority vested [fol. 165] in them by the resolution and that since the trial justice could not find it unconstitutional he erred in enjoining them from continuing such acts thereunder.

We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it effects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated.

Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestion of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney general. Any unofficial group may do as much in this respect as the commission.

As we view this resolution it does no more than clothe a designated group of individuals with an official status but [fol. 166] with little if any more power than to investigate and recommend action by the appropriate authorities where its investigation indicates action is necessary. As such it

may well be considered an arm of the legislature to effectuate its policy of preventing the dissemination of obscene literature and conceivably also in the nature of a bureau of investigation in aid of the police and the department of the attorney general in their detection and prosecution of violators of "chapter 11-31 of the general laws."

No case has been cited to us and we are aware of none wherein a similar resolution has been involved and its constitutionality questioned. While the United States supreme court has considered a number of cases involving various forms of state interference with freedom of the press, some of which have been cited by petitioners, none of them was concerned with a provision like resolution No. 73. *Smith v. California*, 361 U. S. 147; *Kingsley Books Inc. v. Brown*, 354 U. S. 436; *Roth v. United States*; and *Alberts v. California*, 354 U. S. 476; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Lovell v. City of Griffin*, 303 U. S. 444; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697. From our examination of those cases we are of the opinion that the supreme court would not deem such a provision violative of the first amendment as a previous restraint of freedom of the press. In any event unless and until the supreme court so rules we hold that the trial justice did not err in deciding that the resolution was constitutional.

[fol. 167] We now come to the question whether he erred in holding that the commission in applying the resolution acted unconstitutionally. The petitioners argue that he did not, and they cite the following cases in support of his decision. *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479; *American Mercury, Inc. v. Chase*, 13 F. 2d 224; *Busey v. District of Columbia*, 138 F. 2d 592; *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823; *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488; *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903; *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292.

None of those cases is by a court of last resort. In each instance the decision is by a single judge of a court of inferior jurisdiction. However, we have nevertheless examined them, not because they have any standing as precedents but solely because of the possibility that the reasoning upon which the court based its decision might help in

clearly outweighed by the social interest in order and morality."

It is the social interest in order and morality that the legislature by enacting resolution No. 73 is seeking to subserve. And the acts of the commission thereunder were in our opinion a reasonable and lawful implementation of the resolution. To tie their hands by the injunction under consideration here would be to render them impotent to discharge the duties that the general assembly has specifically charged them to perform. We are therefore of the opinion that the trial justice erred in decreeing that their actions were unconstitutional and in enjoining them from so acting henceforth.

[fol. 171] Before concluding this opinion we should comment on *Sunshine Book Co. v. McCaffrey*, 4 App. Div. 2d (N. Y.) 643, upon which petitioners have also relied. Although that case is not by a court of last resort it does come from a court of appeal having a very large measure of revisory jurisdiction and for such reason its decisions stand on a higher plane of authority than those hereinbefore commented upon. However, we do not think the cited case helps the petitioners since it appears to be based on a factual situation not at all like the one here.

In that case a license commissioner threatened a licensed news dealer with revocation of his license if he did not remove certain copies of a magazine from his newstand. In the instant case no license is involved and the commission neither had any regulatory authority over the distributor nor attempted to exercise any such authority. And in the cited case the license commissioner was not acting pursuant to the provisions of a legislative act imposing upon him specifically the duty of investigating obscene literature and recommending prosecution of violators of the statute law against obscenity. In any event even though the case may impliedly stand for more than it expressly decides we are not persuaded to accept it as authority in the special circumstances here.

The petitioners' appeal is denied and dismissed, the respondents' appeal is sustained in part, the decree appealed from is reversed as to order Nos. 2 and 3, otherwise it is affirmed, and the cause is remanded to the superior court for further proceedings.

[fol. 172]. ROBERTS, J., dissenting. I concur in the opinion of the majority that resolution No. 73, as amended, is not in its terms repugnant to the guarantees of the first amendment. The legislature has therein provided for an appropriation for the support of a program of public education concerning the deleterious influence of the publication of obscene, lewd, or indecent periodicals on the morals and welfare of youth and for appointment by the Governor of the members of a commission charged with the duty of conducting that program. I perceive no provision therein which would warrant concluding that the legislature contemplated that the commission was being authorized to act to engage in conduct other than that incidental to the program.

I am not fully persuaded that legislation providing for the dissemination of information relating to a matter of substantial public concern constitutes state action within the purview of the inhibitions of the pertinent constitutional provisions. The commission, as it is therein established, is without authority either to regulate the business that is the subject of the legislation or to accomplish any control over that business through the imposition of sanctions. An exercise of the duties imposed upon the commission therein does not impinge upon any right protected by the first amendment.

However, I am unable to concur in the conclusion of the majority concerning the propriety of the injunctive relief [fol. 173] decreed by the trial justice. The respondents here, whatever might be their rights as individuals, may act legally in their capacities as members of the commission only within the authority conferred upon the commission by the resolution. It appears from the record that the commission, or certain of its officers acting in its behalf, has engaged in conduct that is clearly in excess of the authority conferred upon it by the resolution. Such action, to the extent that it exceeds the authority conferred, is illegal and may, upon a showing of the requisite equitable grounds, be enjoined.

The action upon which this finding of illegality is predicated relates to the circulation of notices to dealers in books and publications wherein the commission identifies certain

books that it seems to be objectionable for sale or distribution for use by youths under the age of eighteen. The circulation of these notices, standing alone, was in my opinion action pursuant to the dissemination of information contemplated in the resolution. There is, however, further evidence tending to establish that the circulation of this information was implemented at the commission's instigation by a police surveillance of the stocks in the possession of these dealers which caused certain of them to withdraw the books so identified from sale generally. Of this the trial justice said: "The sending of these notices with their implicit threats of criminal prosecution are clear violations [fol. 174] of the constitutional provisions guaranteeing freedom of the press." I am not persuaded, however, that it is necessary to pass upon the constitutional issue, it being my opinion that the action to which the trial justice refers was beyond the power conferred upon the commission and, therefore, illegal.

There is in the record evidence which is concerned with the authority that the commission through its officers purported to exercise that buttresses the conclusion which I here reach. In what appears to be a circular letter dated July 19, 1957 over the signature of the executive secretary of the commission, dealers in books and publications were told: This agency was established— * * * with the immediate charge to *prevent* the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age". (Italics mine.) In another undated circular letter over the signature of the executive secretary of the commission, the assertion was made that certain amendatory legislation operated to broaden the powers of this Commission, giving us broad investigative powers * * *. It is my opinion that the two examples above set out suffice to reveal that the commission or its officers substantially misconceived the purpose for which resolution No. 73 was enacted as well as the extent of the authority conferred upon the commission by the terms of that legislation. [fol. 175] After a thorough examination of the resolution I cannot find therein any language which either in express terms or by reasonable inference confers upon the commis-

sion or its officers authority to *prevent* the sale or distribution of any publication. The statement contained in the circular letter of July 19, 1957 constitutes an entirely unwarranted assumption that the commission was vested with power to *prevent* the sale of such publications. Neither do I find in the resolution any provision from which it may be reasonably assumed that the commission or its officers were invested with investigative powers. The language of the resolution providing that the commission make recommendations to prosecute violations of criminal statutes concerned with obscenity confers no inquisitorial power or, for that matter, any power to institute a criminal proceeding. It is my opinion that to so construe the provision referred to would be to clearly violate our well-settled rules of statutory construction.

It is my opinion then that the commission, or its officers acting in its behalf, in purporting to act pursuant to the authority conferred by resolution No. 73 has engaged in conduct that exceeded the authority in fact conferred and to that extent its action was illegal. For this reason I am constrained to dissent from the conclusion of the majority that the trial justice erred in granting the injunctive relief.

Assented to as to form:

Abedon, Michaelson and Stanzler, Attorneys for Petitioners.

J. Joseph Nugent, Attorney General; Joseph L. Breen, Attorney for Respondents.

[fol. 155]

IN THE SUPERIOR COURT OF RHODE ISLAND

(Title omitted)

APPEAL—Filed April 3, 1961

And now, after entry of Decree within the time fixed by Law, the Petitioners come into this Court and say they are aggrieved by Paragraph One of said Decree, holding Resolution 73, as amended, unconstitutional, and claim this their appeal from that portion of said Decree, and move that this Honorable Court fix the time within which said Petitioners shall file their Reasons of Appeal, transcript of evidence, etc.

By their solicitors,

Milton Stanzler, Abedon, Michaelson & Stanzler.

Petitioners have paid the sum of \$40.00 for the Transcript in the above-entitled matter.

Calvert E. Casey, Clerk.

It is hereby ordered that reasons of appeal and the transcript of evidence, etc., be filed in the Office of the Clerk on or before the 21st day of April, A.D., 1961:

Mackenzie, J., Justice of the Superior Court
4/3/61

[fol. 156] Request is hereby made of the court stenographer by the Petitioners for a transcript of the entire evidence, rulings, etc. of the Trial Justice in the hearing in the above-entitled cause.

Milton Stanzler

[fol. 157]

IN THE SUPERIOR COURT OF RHODE ISLAND

(Title omitted)

PETITIONERS' REASONS OF APPEAL—Filed April 21, 1961

Now come the Petitioners in the above-entitled cause, and set forth their Reasons of Appeal from the Decree entered on March 2, 1961, as follows:

1. That Paragraph One of the Order of the Decree is against the Law in that the Resolution, Number 73, as amended, is unconstitutional in that it violates the Freedom of the Press Clause of the First Amendment of the Constitution of the United States; Section One of the Fourteenth Amendment of the Constitution of the United States; and Article One, Section Twenty of the Constitution of the State of Rhode Island.

Bantam Books, Inc., Dell Publishing Company, Inc., Pocket Books, Inc. and The New American Library of World Literature, By their Attorneys, Abedon, Michaelson and Stanzler; Weil, Gotshal and Manges Ms.

Allowed

Cappelli, P.J.

May 10, 1961

[fol. 158]

IN THE SUPERIOR COURT OF RHODE ISLAND

(Title omitted)

APPEAL—Filed March 30, 1961

And now after entry of decree granting the petitioners prayer for a permanent injunction and ordering reimbursement of a sum equal to excess fees or rates paid to the respondent or his predecessor in office, and within the time fixed by law, the respondent comes into court and says he is

solving our problem. On examination we find that they are of no assistance. Most of such cases did not present a factual situation like the one in the instant case. In others where the facts were somewhat analogous the reasoning that led the judge to find prior restraint of freedom of the press is not, in our opinion, convincing. Moreover, in most of those cases the judge predicated such finding on some unlawful action causing or threatening to cause irreparable injury to the complainant's property.

In the case at bar the evidence discloses no unlawful act on the part of the commission. On the contrary, their acts [fol. 168] were in accord with the clearly expressed objectives of the resolution. They were only seeking and received the voluntary cooperation of petitioners' distributor. He was free to disregard their request for cooperation and if he did so he had nothing to fear except prosecution for violating G. L. 1956, chap. 11-31. And even such fear would be groundless if the books in question were not obscene.

It is no justification for petitioners to argue as they do that because the local distributor will not want to oppose the commission such a practice has the inevitable result of suppression of their books by censorship. Enforcement of the law against obscenity is not easy. It is hedged about by constitutional safeguards which in appropriate instances have been strictly applied. But the United States supreme court has repeatedly held that obscenity is not protected by the guaranties of the first amendment. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Roth v. United States*, 354 U. S. 476. However, that court has also held that the local distributor or bookseller cannot be convicted of such an offense unless the state proves that he had knowledge of the obscene nature of the book. *Smith v. California*, 361 U. S. 147.

Ordinarily a distributor or bookseller is not expected to know the character of all the books he distributes. It is only fair that he should be given some advance notice of which he may avail himself, if he chooses, before criminal proceedings are commenced against him. It is in that con-[fol. 169] text we interpret the action of the commission here and the willing response thereto of the distributor. Of course the publisher would much prefer to have the dis-

tributor stand his ground and refuse to cooperate regardless of the consequences to him.

The status of the publisher, however, is vastly different from that of the distributor. He may not plead lack of notice. It is his business to know what he is publishing. If his publication on the bookseller's shelf is obscene, he is the real offender and it is his offense which resolution No. 73 seeks to discover and prosecute. But more often than not the publisher is beyond reach of the local law and in effect hides behind the unoffending local distributor.

When, as in the case at bar, steps are taken to save the local distributor from embroilment in criminal proceedings the petitioning publishers come forward protesting that the commission is depriving them of their constitutional right of freedom of the press. Their success in a number of jurisdictions in invoking the injunctive remedy has apparently encouraged them to invoke it here in the hope of thwarting the implementation by the commission of resolution No. 73. They rely heavily on the above-cited cases where such successes have been achieved.

However, in the instant case we are of the opinion that they are not aggrieved by any deprivation of their constitutional right to distribute their books in this state. Resolution No. 73 does not by its terms nor by the commission's [fol. 170] acts under it prevent them from doing so. Unless their books are obscene they have nothing to fear. But if they are deemed to be obscene by the prosecuting authority of the state they cannot use the injunctive remedy of equity to prevent the state from bringing them to the bar of justice by appropriate criminal proceedings. In such proceedings they will have a full, fair, and impartial judicial determination of the issue of obscenity.

'Obscenity is entitled to no special protection under either the state or federal constitution. In *Chaplinsky v. New Hampshire*, 315 U. S. 568, the supreme court of the United States unanimously declared that lewd and obscene speech raises no constitutional question. At page 572 it said, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is

[fol. 176]

IN THE SUPERIOR COURT OF RHODE ISLAND

M.P. No. 5139

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC. and THE NEW AMERICAN LIBRARY
OF WORLD LITERATURE, INC., Petitioners,

—VS.—

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLAN-
NERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH
LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN
and EUSTACE T. PLIAKAS, in their capacities as Members
of THE RHODE ISLAND COMMISSION TO ENCOURAGE MO-
RALITY IN YOUTH and ALBERT McALOON, in his capacity
as Executive Secretary of THE RHODE ISLAND COMMIS-
SION TO ENCOURAGE MORALITY IN YOUTH, Respondents.

DECREE—January 18, 1962

This cause came on to be heard on the Petition of Bantam Books, Inc., Dell Publishing Company, Inc., Pocket Books, Inc., and The New American Library of World Literature, Inc., praying for a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, 1956, as amended); wherein the petitioners seek to have Resolution No. 73, adopted at the January, 1956, Session of the Rhode Island General Assembly, as amended, declared unconstitutional, and wherein the petitioners seek to have certain actions of the respondents declared unconstitutional.

Whereas on the 2nd day of March, A. D., 1961 a Decree was entered herein ordering, adjudging and decreeing:

[fol. 177] 1. That Resolution No. 73, as amended, is constitutional.

2. That the acts of the respondents in disseminating the notices referred to in said decree concerning books and publications are hereby declared unconstitutional.

3. That respondents, and each of them, their agents, servants and employees, and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in such Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances, and

Whereas the petitioners appealed to the Supreme Court of the State of Rhode Island from order No. 1 of said decree and the respondents appealed thereto from orders Nos. 2 and 3 thereof, and

Whereas the said Supreme Court of Rhode Island by its decision upon said appeals directed that the petitioner's appeal be denied and dismissed and that the respondents' appeal be sustained in part to the extent of reversing orders Nos. 2 and 3 and otherwise affirming said decree and remanding the cause to this Court for further proceedings,

[fol. 178] Therefore, it is hereby Ordered, Adjudged and Decreed;

1. That Resolution No. 73, as amended, is constitutional.
2. That the acts of the respondents in disseminating the notices concerning books and publications distributed in the State of Rhode Island referred to in the decree appealed from are hereby declared constitutional.

Entered as a Decree of this Honorable Court this 18th day of January, A. D., 1962.

Per Order: Thomas A. Palangio, Asst. Clerk.

Enter: Mackenzie, J., Jan. 18, 1962.

[fol. 179]

IN THE SUPERIOR COURT OF RHODE ISLAND

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed March 16, 1962

Notice is hereby given that Bantam Books, Inc., Dell Publishing Company, Inc., Pocket Books, Inc. and The New American Library of World Literature, Inc., the appellants above named, hereby appeal to the Supreme Court of the United States from the Final Decree of the Superior Court of the State of Rhode Island entered in this cause on the 18th day of January, A.D., 1962.

Said Final Decree was entered pursuant to and in accordance with the opinion of the Supreme Court of the State of Rhode Island which (a) denied and dismissed appellants' appeal from so much of the Decree of the Superior Court of the State of Rhode Island entered on the 2nd day of March, 1961 as denied appellants' petition for [fol. 180] a declaratory judgment to declare unconstitutional Resolution No. 73, adopted at the January, 1956 Session of the Rhode Island General Assembly and approved April 26, 1956, as amended by S. 444 of the General Assembly on May 25, 1959; (b) sustained appellees' appeal in part and reversed the aforesaid Decree of the Superior Court entered on the 2nd day of March, 1961 to the extent of reversing orders Nos. 2 and 3 thereof; and (c) remanded the cause to the Superior Court for further proceedings for the purpose of entering a Final Decree in accordance therewith.

II

This appeal is taken pursuant to Title 28 U.S.C. Sec. 1257 (2).

III

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

- (a) The petition.
- (b) The answer to the petition.
- (c) Transcript of the minutes of the hearing before Superior Court Justice William M. Mackenzie held on December 5, 1960.
- (d) Appellants' Exhibits Nos. 1 to 16, inclusive, introduced at the aforesaid hearing.
- (e) Appellees' Exhibits Nos. A. to C. inclusive, introduced in evidence at the aforesaid hearing.
- (f) The decision of Superior Court Justice William M. Mackenzie.
- (g) The Decree entered on March 2, 1961, pursuant to the decision of Superior Court Justice William M. Mackenzie.
- (h) Appellants' Notice of Appeal to the Supreme Court of the State of Rhode Island from the aforesaid Decree.

[fol. 181] (i) Appellees' Notice of Appeal to the Supreme Court of the State of Rhode Island from the aforesaid Decree.

- (j) The opinion of the Supreme Court on said Appeal.
- (k) The decree entered on the 18th day of January, 1962 in the Superior Court pursuant to the aforesaid opinion of the Supreme Court of the State of Rhode Island.

IV

The following questions are presented by this appeal:

1. Does Resolution No. 73, adopted at the January, 1956 Session of the Rhode Island Assembly and approved April 26, 1956, as amended by S. 444 of the General Assembly of Rhode Island on May 25, 1959, creating the Rhode Island Commission to Encourage Morality in Youth, violate the First and Fourteenth Amendments to the Constitution of the United States?

2. Did the acts and practices of the Appellees, the members and Executive Secretary of the Rhode Island Commission to Encourage Morality in Youth, in purported compliance with the duties imposed upon them by the aforesaid Resolution No. 73, as amended, tend to suppress or inhibit the circulation of books in Rhode Island, and did in fact suppress such circulation of books in Rhode Island, without judicial determination that books so suppressed are obscene, in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States?

Abedon, Michaelson & Stanzler, 626 Industrial Bank Building, Providence 3, Rhode Island; Weil, Gotshal & Manges, 60 East 42nd Street, New York 17, New York, Attorneys for Appellants.

[fol. 182]

Proof of Service

I, Richard A. Sholnils, an attorney in the office of Abedon, Michaelson & Stanzler, co-attorneys of record for the appellants herein, depose and say:

That on the 16th day of March, 1962, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees herein by delivering the same to Carmine A. Rao (S) in the offices of J. Joseph Nugent, Esquire, Attorney General of the State of Rhode Island, counsel of record for said Appellees located at the Providence County Court House, 250 Benefit Street, Providence, Rhode Island.

Richard A. Sholnils

Subscribed and sworn to before me at Providence, Rhode Island, this 16th day of March, 1962.

F. Thomas O'Halloran, Notary Public, State of Rhode Island (my comm. expires 6/30/66).

[fol. 183]

SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 25, 1962

Appeal from the Superior Court of the State of Rhode Island.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

June 25, 1962

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

Office Supreme Court, U.S.

FILED

MAY 14 1962

IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States
OCTOBER TERM, 1962

No. ~~89~~

118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC.,

Appellants,

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT McALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

JURISDICTIONAL STATEMENT

WEIL, GOTSHAL & MANGES,
60 East 42nd Street,
New York 17, N. Y.

ABEDON, MICHAELSON AND STANZLER,
626 Industrial Bank Building,
Providence 3, Rhode Island,
Attorneys for Appellants.

J. JOSEPH NUGENT,
Attorney General, State of Rhode Island,

JOSEPH L. BREEN,
Chief Special Counsel,
Providence County Courthouse,
250 Benefit Street,
Providence, Rhode Island,
Attorneys for Appellees.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC.,

Appellants,

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLAN-
NERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEON-
ELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and
EUSTACE T. PLAKAS, in their capacities as Members of the
RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN
YOUTH and ALBERT McALOON, in his capacity as Executive
Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE
MORALITY IN YOUTH.

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the final decree of the Superior Court of the State of Rhode Island entered on January 18, 1962. In accordance with Rhode Island practice,* that final decree was entered pursuant to the opinion of the Supreme Court of the State of Rhode Island. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal constitutional questions are presented.

* *Testa v. Katt*, 330 U. S. 386, 389 footnote 3 (1947).

Opinions Below

The opinion of Justice William M. Mackenzie of the Superior Court of the State of Rhode Island is not reported. A copy of that opinion is annexed hereto as Appendix A. The majority and dissenting opinions of the Supreme Court of the State of Rhode Island, four judges participating, are reported in 176 A. 2d 393. Copies of those opinions are annexed hereto as Appendix B.

Jurisdiction

In March 1960, Appellants, publishers of paperbound books distributed in Rhode Island, filed a petition to the Superior Court of the State of Rhode Island for a declaratory judgment pursuant to The Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956, as amended). In that petition Appellants prayed for judgment as follows:

A. Declaring that Resolution No. 73 (which created the Rhode Island Commission to Encourage Morality in Youth, of which Appellees are the members and executive secretary), as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island and

B. Declaring that the acts and practices of Appellees in purported performance of their duties as members of the Rhode Island Commission to Encourage Morality in Youth, as alleged in such petition, have violated and violate the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island and enjoining and restraining

Appellees, their agents, servants and employees from continuing those acts.

After a trial in the Superior Court of Rhode Island before Justice William M. Mackenzie, and the rendition by said Justice of his opinion (Appendix A) a decree was entered on March 2, 1961 in spid Superior Court. A copy of said decree is annexed hereto as Exhibit C.

Said decree, to the extent here pertinent, reads as follows:

"Wherefore, it is hereby Ordered, Adjudged and Decreed:

1. That Resolution No. 73, as amended, is constitutional.
2. That the acts of the Respondents [i.e. the Appellees] in disseminating said notices concerning books and publications are hereby declared unconstitutional.
3. That Respondents, and each of them, their agents, servants and employees and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers, that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of book lists or bulletins.
4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances."

4

Both sides appealed from the aforesaid decree to the Supreme Court of Rhode Island—Appellants front so much thereof as declared Resolution No. 73, as amended, to be constitutional and Appellees from the remainder thereof.

The Supreme Court of Rhode Island in its opinion on said appeal denied and dismissed Appellants' appeal, sustained Appellees' appeal to the extent of reversing Orders Nos. 2 and 3 hereinabove quoted and remanded the cause to the Superior Court for further proceedings for the purpose of entering a final decree in accordance with said opinion.

On January 18, 1962, the Superior Court of Rhode Island entered a final decree in accordance with and pursuant to the aforesaid opinion of the Supreme Court. A copy of said decree is annexed hereto as Appendix D.

The notice of appeal to the Supreme Court of the United States from such final decree was filed in the Superior Court of Rhode Island on March 16, 1962.

The statutory provision conferring on the Supreme Court of the United States jurisdiction of this appeal is Title 28, United States Code, Section 1257 (2).

The following decisions sustain the jurisdiction of this Court to review the decree on this appeal. *Smith v. California*, 361 U. S. 147 (1959); *Fowler v. Rhode Island*, 345 U. S. 67 (1953); *Burstyn v. Wilson*, 343 U. S. 495 (1952); *Winters v. New York*, 333 U. S. 507 (1948).

Statute Involved

The statute here involved is Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly and approved April 26, 1956, as amended by S. 444 of the said General Assembly on May 25, 1959.

Resolution No. 73 (January Sessions Acts and Resolves 1956) reads as follows:

RHODE ISLAND

1102

JANUARY SESSION, 1956

No. 73-H 1000—Approved April 26, 1956

RESOLUTION creating a commission to encourage morality in youth.

Resolved. That a commission be and it is hereby created, consisting of nine members to be appointed by the governor, one of whom he shall designate as chairman.

Forthwith upon the passage of this resolution, the governor shall appoint 1 member to serve until the 1st day of March, 1957, 1 member to serve until the 1st day of March, 1958, 1 member to serve until the 1st day of March, 1959, and 1 member to serve until the 1st day of March, 1960, and 1 member to serve until the 1st day of March, 1961. During the month of February, 1957, and annually thereafter, the governor shall appoint a member to serve for a term of five years commencing with the 1st day of March then next ensuing and until his successor has been appointed and qualified to succeed the member whose term will then next expire.

Vacancies on said commission shall be filled for the unexpired term of the member or members being succeeded.

Any member shall be eligible to succeed himself.

Forthwith upon the passage of this resolution the commission shall meet and organize.

It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined

in sections 43, 47, 48 and 49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections 43, 47, 48 and 49 of said chapter 610, as amended.*

Said commission may employ such assistants, experts, and other personnel as may be necessary in the proper exercise of its duties hereunder.

The members of said commission shall serve without compensation but shall be allowed their necessary and travel expenses, and shall report annually during the month of January to the governor and the general assembly as to their activities and findings; and be it further

Resolved, That the general assembly shall annually appropriate such sum as may be necessary, to carry out the purposes of this resolution; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated; and be it further

Resolved, That for the purpose of carrying out the provisions of this resolution for the period ending June 30, 1957, the sum of \$10,000.00 be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated.

The said S. 444 (Resolution No. 95, Acts and Resolves 1959), amended the sixth paragraph of Resolution No. 73 to read as follows:

* This paragraph is the paragraph amended by S. 444 as set forth below.

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, or tinted paper or other writing containing obscene, indecent or impure language, as is fined in Chapter 11-51 of the general laws, entitled 'Obscene' and objectionable publications and shows; and to investigate and recommend the prosecution of all violations of said sections; and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and or treatment which would ameliorate or eliminate said causes."

Questions Presented

1. Does Resolution No. 73, adopted at the January, 1956 Session of the Rhode Island General Assembly and approved April 26, 1956, as amended by S. 444 of the said General Assembly on May 26, 1959, creating the Rhode Island Commission to Encourage Morality in Youth, tend to suppress or inhibit the circulation of books in Rhode Island in violation of the First and Fourteenth Amendments to the Constitution of the United States?
2. Did the acts and practices of the Appellees, the members and executive secretary of The Rhode Island Commission to Encourage Morality in Youth, in purported compliance with the duties imposed upon them by the aforesaid Resolution No. 73, as amended, tend to suppress or inhibit the circulation of books in Rhode Island, and did they in fact suppress such circulation of books in Rhode Island, without judicial determination that books so suppressed are obscene, in violation of the First and Four-

teenth Amendments to the Constitution of the United States?

Statement

The Federal constitutional questions here sought to be reviewed were raised in the petition filed by Appellants in the Superior Court of Rhode Island as more particularly set forth hereinabove at p. 2. These issues were tried in the Superior Court and were again raised on the appeal to the Supreme Court of Rhode Island, as appears from the opinion of that Court (Appendix B). Thus, this appeal involves a final decree of the highest court of the State of Rhode Island sustaining the constitutionality of a Rhode Island statute and sustaining the constitutionality of the acts and practices of the Appellees charged with the administration of said statute, against Appellants' contentions that said statute and such acts and practices violated Appellants' rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The Facts

The uncontradicted facts material to the consideration of the questions presented, as established at the trial before Superior Court Justice Mackenzie are as follows:

Appellants are publishers of paper-bound books, which have been for many years and are now being distributed in Rhode Island (T.* p. 12, A. 10; p. 13, A. 12-13).

Appellees are members of the Rhode Island Commission to Encourage Morality in Youth (herein referred to as the "Commission"), except Appellee Albert McAloon, who is its executive secretary (T. p. 70, A. 68; T. p. 42, A. 3).

* "T" refers to the transcript of the minutes of the trial.

In May, 1959, the sixth paragraph of Resolution No. 73 was amended by S. 444 of the General Assembly to read as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows', and to investigate and recommend the prosecution of all violations of said sections." * * *"
 (Italics supplied.)

Max Silverstein & Sons (hereinafter referred to as "Silverstein"), of 2 Lancaster Street, Providence, for many years has been and is now the exclusive wholesale distributor for Appellants' books for about 70% to 75% of the State of Rhode Island, including all of Providence. As such wholesale distributor, Silverstein distributes Appellants' books to retailers (T. p. 11, A. 2-4; p. 12, A. 9; p. 14, A. 16).

Shortly after the Commission began to function, Silverstein received a notice on the official letterhead of the Commission dated July 19, 1957, reading in part, as follows:

"This agency was established by legislative order in 1956 with the immediate charge to prevent the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.

The Commissioners have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths under eighteen years of age.

The Chiefs of Police have been given the names of the aforementioned magazines with the order

that they are not to be sold, distributed or displayed to youths under eighteen years of age.

The Attorney General will act for us in cases of non-compliance.

The Commissioners trust that you will cooperate with this agency in their work. They fully realize the complexity of this problem but believe, in view of the need of strengthening our youths, improving family life and preventing un-social behavior, that the above-named publications are definitely objectionable under Chapter 610* of the general laws as amended.

Another list will follow shortly.

Thanking you for your anticipated cooperation,
I am,

Sincerely yours,

ALBERT J. McALOON
Executive Secretary"

(Pet.** Ex. 1) (Italics supplied)

Under date of August 5, 1957, Silverstein received another notice from the Commission on its official letterhead reading, in part, as follows:

"The Commissioners by majority vote have declared that the following three magazines are objectionable for sale, distribution for display for youth under 18 years of age.

We appreciate your *cooperation* in regard to the first list. If you have questions regarding the aims or methods of our Commission I suggest that you contact me at the above address.

Looking forward to *continued cooperation*, I am,"

(Pet. Ex. 2) (Italics supplied.)

* Relating to obscene and objectionable publications, now Chapter 11-31.

** Appellants here.

Another undated notice received by Silverstein from the Commission (in 1958) reads as follows:

"The Rhode Island Commission on Youth, unanimously established by the Rhode Island legislature in 1956, is pleased to offer you these enclosures, namely, the law on obscenity, the amendment creating this Commission, and a list of the most recent publications found objectionable for 'sale, distribution or display for youth under 18 years of age'.

This list should be used as a guide in judging other similar publications not named.

Your *cooperation* in removing the listed and other objectionable publications from your newsstands will be appreciated. *Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department.*" (Pet. Ex. 11) (Italics supplied)

Between August 1957 and February 1960 Silverstein received many other official notices from the Commission, each listing certain publications as having been found objectionable for "sale, distribution or display for youths under 18 years of age," each such notice ending either with "Thanking you for your past cooperation," or "Thank you for your cooperation," or "Thank you for your anticipated cooperation." (Pet. Exs. 2, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15)

An undated "News Letter" received by Silverstein from the Commission (Pet. Ex. 16) in or about December 1957 contains the following paragraph:

"Your Commission has reviewed 38 publications. They have found by a majority vote 32 to be totally objectionable for youths under 18. *The lists have been sent to distributors and police departments. To the present cooperation this has been gratifying.*" (Italics supplied)

Copies of each such notice were sent by Respondents to the Police Departments of the various cities and towns in Rhode Island (Pet. Ex. 1 and T. p. 47, A. 20).

Promptly after receipt from the Commission of each notice, Silverstein stopped selling the publications distributed by it which were listed on such notice and, in addition, instructed its field men to pick up all unsold copies from its retail customers. The unsold copies were then returned to the publishers (T. p. 25, A. 23; p. 26, A. 24-27). Silverstein took this action "rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply, * * *," (T. p. 26, A. 27) The testimony further shows, that it was for the same reason--the desire to avoid being involved in "a court proceeding" with a "duly authorized organization" that Silverstein agreed to "cooperate" with the Commission in its activities (T. p. 40, A. 66-67).

Shortly after the receipt from the Commission of such notices, Silverstein would be asked by a member of the Providence Police Department for a report of what had been done in connection with the publications listed on such notices. The police officer would ask information as to the number of copies originally received by Silverstein, the number that had been taken back from the retailers and the number that had been returned by Silverstein to the publishers (T. p. 26, A. 29; p. 27, A. 32; pp. 28-29, A. 34-35).

The Commission's Annual Report dated January 1960 contains the following statements:

"Thirty magazine and paperback pocketbooks were added to the previous list of publications found objectionable for youth under 18 by a majority vote of the Commission. This brings the total to 108.

The guide lists (requested by chiefs of police, distributors and educators in 1957) of the type of publications deemed objectionable for youth under 18 is still sent to all local distributors and chiefs of police in Rhode Island, with the result that in the last six months our newsstands show a very improved condition.

In most cases local distributors have been cooperative this year, *withdrawing publications* of the type listed in the Commission guide list and *returning them to publishers*.

This Commission feels that the guide list, *Court action initiated by this Commission*, and the cooperation of the Attorney General's Department is largely responsible for the "new look" on Rhode Island newsstands." (Resp. Ex. A, pp. 2 and 3) (Italics supplied)

One Commission notice (Pet. Ex. 6) refers to the book PEYTON PLACE by Grace Metalious. The paper-bound edition of that book is published by Appellant Dell Publishing Company, Inc. (T. p. 14, A. 17). Another Commission notice (Pet. Ex. 14) refers to the book THE BRAMBLE BUSH by Charles Mergendahl. The paper bound edition of that book is published by Appellant Bantam Books, Inc. (T. p. 14; A. 18).

The Federal Questions Here Presented are Substantial

We submit that upon basic decided principles the conclusion is inescapable that Resolution No. 73, as amended by S. 444, and the acts and practices of Appellees in purported compliance with their duties under said statute violate freedom of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Since *Near v. Minnesota* 283 U. S. 697 (1931), it has been settled doctrine that by virtue of the Fourteenth Amendment liberty of the press and speech is safeguarded from invasion by state action. *Smith v. California* 361 U. S. 147, 150 (1959).

The dissemination of books is an integral part of freedom of the press. As was aptly stated by this Court in *Smith v. California, supra*, at p. 150:

"And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices. (citations omitted). Certainly a retail book seller plays a most significant role in the process of the distribution of books."

While it is true that under *Roth v. United States*, 354 U. S. 476 (1957), obscene publications are not protected by the First Amendment, it is equally true that there is no "state power to restrict the dissemination of books which are not obscene." (*Smith v. California, supra*, p. 152)

Furthermore, " * * * the question whether a particular work is of that character (i.e., obscene) involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind." *Roth v. United States*, 354 U. S. 476, 497-498 (1957) (Harlan, J., concurring). See also *Feiner v. New York*, 340 U. S. 315, 316 (1951); *Watts v. Indiana*, 338 U. S. 49, 51 (1949); *Norys v. Alabama*, 294 U. S. 587, 589-590 (1935); *People v. Rishmond County News*, 9 N. Y. 2d 578, 580 (1961).

Such a "sensitive and delicate" judgment is one that must be made by the courts in accordance with the requirements of due process of law. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 495 (1959), affirmed 276 F.2d 433 (2 Cir. 1960); *Roth v. United States, supra*, pp. 488-489; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 441, 443 (1957).

It follows, therefore, that no state possesses the power to suppress or limit the circulation of any book until *there has first been a determination by a court of competent jurisdiction, in accordance with the requirement of due process, that such book is obscene* within the definition laid down in *Roth v. United States, supra.*

This was well expressed in *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 834 (1953), where the District Court stated:

"Until a court of competent jurisdiction adjudges a work to be obscene *** there would exist no warrant in law for its suppression."

It further follows that any censorship method devised by a state which results in the suppression or limitation of the circulation of any book prior to such a judicial determination that such book is obscene, violates the constitutional right of the publisher, the bookseller and the public in general.

In point of fact, wherever any such method of censorship has been devised by any state or state agency, based upon implied threats of criminal prosecution, such method has been struck down by the courts. *Sunshine Book Co. v. McCaffrey*, 4 App. Div. (2d) 643, 647 (N. Y. 1957); *Bantam Books, Inc. v. Mello*, 25 N. J. Superior 292 (1953), modified 44 N. J. 524 (1953); *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (1953); *Doubleday Publishing Co. v. Fitzgerald*, 271 Fed. 479, 482 (1921); *H.M.H. Publishing Co. v. Garrett*, 151 F. Supp. 903 (1957); *Random House, Inc. v. City of Detroit, et al.* unreported, File No. 555-684, Cir. Ct. Wayne County, Mich. (March 29, 1957 on preliminary injunction; June 16, 1958 on permanent injunction). A copy of the opinion on the preliminary injunction is annexed hereto as Appendix E.

Illustrative of the last cited authorities is *Sunshine Book Co. v. McCaffrey, supra.* In that case, the defendant, the License Commissioner of New York City, had issued a letter to all licensed newsdealers threatening to institute proceedings to revoke or suspend the licenses of those dealers who did not discontinue the sale of certain magazines listed in his letter. The basis for the Commissioner's letter was the alleged obscenity of the listed magazines. Plaintiff in that case was the publisher of several of the magazines.

The Appellate Division of the New York Supreme Court reversed the lower court and granted an injunction directing the License Commissioner to recall his letter and to instruct the newsdealers to disregard it. In the course of its opinion the Court said at page 647:

"Even as we would not hesitate to strike down a palpable attempt to violate those guarantees [freedom of speech and press], so, by the same token, are we constantly vigilant against any indirect encroachments, however subtle, which result in censorship. Courts have condemned informal methods of censorship which were attempted by threats of criminal prosecution (*Bantam Books v. Melko*, 25 N. J. Super. 292, mod. 14 N. J. 524; *New Amer. Lib. v. Allen*, 114 F. Supp. 823; *Dearborn Pub. Co. v. Fitzgerald*, 271 F. 479, 482)."

• • • •

"The existing statutes afford means to law enforcement officials for dealing with obscene literature and publications. New methods which meet constitutional standards may be devised in the future by the Legislature. We cannot predict what forms these may take. The human mind is fertile and necessity promotes ingenuity. *But whatever means may be taken to stamp out the pernicious evil of obscenity, they must conform with, and respect, the constitutional guarantees of free speech and*

freedom of the press. We cannot countenance encroachments upon those rights by censorship by an administrative official." To permit that would be to inject the unwholesome effects which the uncompromising rule against prior restraint was calculated to prevent." (pp. 648-649) (Italics supplied)

In derogation of the aforesaid fundamental principles, the uncontradicted facts established at the trial herein show that the effect of the adoption of Resolution No. 73, as amended, and of the activities engaged in by the Commission in purported compliance with its duties under that Resolution has been to suppress the circulation of books in Rhode Island *without any judicial determination as to the obscenity of these books.*

Resolution No. 73, as amended, states that it shall be the duty of the Commission "to educate the public concerning any book *** containing obscene, indecent or impure language, *** and to investigate and recommend the prosecution of all violations of said sections, ***."

Any such "education" of the public by the Commission concerning any book containing obscene language, whether by advice, information, list, notice or otherwise, by the very language of Resolution No. 73, as amended, constitutes an implicit threat that unless there is cessation of sale by wholesale distributors and retail booksellers of that book, the said wholesale distributors and retail booksellers would be prosecuted criminally.

Such threat results from the fact that, pursuant to Resolution No. 73, as amended, the Commission's duty to "educate the public" concerning any "book *** containing obscene, indecent or impure language" is implemented by the duty conferred upon the Commission by the Resolution to recommend prosecution of the wholesale distributors and retail booksellers for alleged violation of Chapter

11-31 of the General Laws of Rhode Island entitled "Obscene and objectionable publications and shows", which, among other things, makes it a criminal offense for any person to import, print, publish, sell, lend, give away, advertise for sale, or distribute any "book . . . containing obscene, indecent or impure language".

With respect to the constitutionality of Resolution No. 73, Judge Mackenzie had this to say:

"It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The Resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal prosecution, the inevitable result is the suppression of books without a judicial determination as to whether or not they are obscene. *The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island.*" (Italics supplied) (Appendix A, pp. 33-34)

The Commission made explicit the implicit threat of prosecution conveyed by Resolution No. 73, by the notices which it sent to distributors. Thus, in its notice of July 19, 1957 (Pet. Ex. 1) the Commission stated:

"The Chiefs of Police have been given the names of the aforementioned magazines with the *order* that they are not to be sold, distributed or displayed to youths under eighteen years of age.

The Attorney General will act for us in cases of non-compliance." (Italics supplied.)

In Petitioners' Exhibit 11, an undated notice sent by the Commission in 1958 the following statement is contained:

"Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."

In addition, as the numerous exhibits establish, and as was testified upon the trial by Appellee McAloon, copies of the various notices issued by the Commission were sent to the Chiefs of Police throughout Rhode Island. In fact, the witness Kaplan (Silverstein's manager) testified that shortly after the receipt of each such notice from the Commission, a request was received from a member of the Providence Police Department for a report as to what Silverstein had done with respect to publications distributed by it listed on such notice. (T. p. 27, A. 32)

Under these circumstances, to contend as Appellees did upon the trial, that the stopping of sale of the publications listed in the Commission's notices was "voluntary" on the part of the distributors, is merely engaging in semantics. Particularly is this so in the light of the testimony of Mr. Kaplan that Silverstein, upon receipt of each notice, stopped selling the publications distributed by it listed on such notice and instructed its field men to recall all unsold copies from retail customers because of Silverstein's desire to avoid "the possibility of some sort of a court action against ourselves, as well as the people that we supply." (T. p. 25, A. 23; p. 26, A. 24-27)

Superior Court Justice Mackenzie, in rejecting this defense, made the following comments:

"To say that the action taken by the distributors was voluntary is unrealistic. Here we have notices sent out on letterheads entitled RHODE ISLAND COMMISSION ON YOUTH informing the distributor that

this official, public agency, "established by legislative order in 1936" (Petitioners' Exhibit "1") had made a finding that certain books and magazines being sold and delivered by the distributors were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.

"The Chiefs of Police have been given the names of the aforementioned magazines *with the order* that they are not to be sold, * * * (Petitioners' Exhibit 1) (italics by the Court)

Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of various cities and towns. Yet the respondent McAloon would have us believe that the books and magazines were not "banned" by the Commission, and that the distributors voluntarily cooperated with the Commission. *The effect of the notices sent out by the Commission was clearly intimidation.*" (Italics supplied) (Appendix A, p. 30)

In reversing Justice Mackenzie the Supreme Court of Rhode Island, in the majority opinion, said,

"We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated.

Unless and until such publication is judicially determined to be obscene the distributor may with

impunity refuse to respond to any suggestions of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney-general. Any unofficial group may do as much in this respect as the commission." (Appendix B, pp. 39-40)

We submit that the rationale of the Rhode Island Supreme Court completely ignores the realities of the situation. Whether or not the Commission had the legal power to order prosecution is not material. What is material, we submit, is that the Resolution itself, conferring upon Appellees the statutory power to recommend prosecution under the obscenity laws, has the tendency, and, in fact, has had the actual effect, of inhibiting the circulation of books without prior judicial determination that such books are obscene.

Nor is there any validity to the Rhode Island's Supreme Court's statement that "Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission" (Appendix B, p. 40) or its further statement, "He was free to disregard their request for co-operation and if he did so he had nothing to fear except prosecution for violating G.L. 1956, chap. 11-31." (Appendix B, p. 42)

A complete answer to this argument was given by the Court in *American Mercury, Inc. v. Chase*, 13 F. (2d) 224, 225 (1926), as follows:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would

prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

We submit that as a result of Resolution No. 73, as amended, and the activities of Appellees thereunder, Appellants Bantam Books, Inc. and Dell Publishing Company, Inc. have been denied the right to circulate certain books published by them, and all Appellants are constantly subject to the threat of being deprived of their right to circulate books in Rhode Island. In addition, the public of Rhode Island has been deprived of the right to read certain books and, so long as Resolution No. 73 remains in effect, is constantly subject to deprivation of the freedom to read. Such deprivation has been accomplished and is threatened to be accomplished without any prior judicial determination that the books involved are obscene. Rather the determination takes the form of a pre-judgment by the Appellees—in most cases by a majority—based upon unknown standards.

We submit, that what was said by this Court in *Smith v. California, supra*, with respect to another statute, is here equally applicable. This Court there said at page 154:

"The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public; hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

And at page 155:

"It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

CONCLUSION

For the reasons hereinabove set forth we urge this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A**Opinion of Superior Court of Rhode Island****STATE OF RHODE ISLAND AND PROVIDENCE
PLANTATIONS**

PROVIDENCE, Sc.

SUPERIOR COURT

M.P. No. 5139

BANTAM BOOKS, INC., ET AL

vs.

JOSEPH A. SULLIVAN, ET AL, IN THEIR CAPACITIES AS MEMBERS OF THE RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH, ET AL

DECISION

MACKENZIE, J. This is a petition which has been brought under the Uniform Declaratory Judgments Act (*Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956*, as amended). The petitioners are four New York corporations; they are publishers of paper bound books which are and have been for a long period of time distributed in the State of Rhode Island. The respondents are the present members and the executive secretary of the Rhode Island Commission to Encourage Morality in Youth, hereinafter sometimes referred to as the Commission. The said Commission was created pursuant to *Resolution No. 73* adopted at the January, 1956, Session of the Rhode Island General Assembly and approved April 26, 1956. The said Resolution was amended by S. 444 of the General Assembly on May 25, 1956.

The said S. 444 amended the sixth paragraph of Resolution No. 73 to read as follows:

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"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes, and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

There appears to be little dispute as to the facts in this case. About a year after the Commission was created in 1956 it sent notices to various book and magazine distributors, including Max Silverstein & Sons (hereinafter sometimes referred to as "Silverstein") of 344 Water Street, Providence, who at the time was and for a long time had been the distributor in the Providence area for the petitioners. Several of the notices which Silverstein received from the Commission were introduced into evidence (Petitioners' Exhibits "1" to "16", inclusive). The notices informed Silverstein that certain books and magazines, listed therein and distributed by him, had been reviewed by the Commission and that by majority vote the Commission had declared them to be objectionable for sale, distribution or display for youths under eighteen years of age. The first of the notices (Petitioners' Exhibit "1") also contained the following language:

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"The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.

"The Attorney General will act for us in cases of non-compliance.

"The Commissioners trust that you will cooperate with this agency in their work. * * *

Another notice received by Silverstein from the Commission included the following language:

"Your cooperation in removing the listed and other objectionable publications from your newsstands will be appreciated. Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department" (Petitioners' Exhibit "11").

Petitioners' Exhibit "6" is a notice received by Silverstein from the Commission with reference to *Peyton Place*, a paper bound book published by one of the petitioners, and Petitioners' Exhibit "14" is a similar notice with reference to *The Bramble Bush*, a paper bound book published by another of the petitioners.

Joel Kaplan, manager of Silverstein & Sons, testified that after receiving each notice from the Commission his company accepted no more orders for the publications listed, stopped selling the copies it had, and instructed its men to pick up all unsold copies from its retail customers. The unsold copies were then all returned to the publishers. The witness testified that his company did all this rather than face court action. In cross-examination the witness testified that he had attended a meeting which had been called by the Commission, at which meeting he said his

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company agreed to cooperate with the Commission. On re-direct examination he stated that he had agreed to cooperate with the Commission because the Commission was duly authorized under law and they did not want to be involved in any litigation, or words to that effect.

He also testified that shortly after his company received each notice it would be visited by a member of the Providence Police Department who wanted a report on what action Silverstein had taken as to the books and magazines listed in that notice. The police officer wanted the number of copies originally received from the publisher, the number that had been reclaimed from the retailers and the number that had been returned by Silverstein to the publishers. (See pencilled notations on Petitioners' Exhibit "7".)

The petitioners contend that said *Resolution 73*, as amended, and also the action taken by the members of the Commission are unconstitutional because they are in violation of the provisions guaranteeing freedom of the press. (First Amendment, Constitution of the United States; Section 1 of the Fourteenth Amendment, Constitution of the United States; Article 1, Section 20, Constitution of Rhode Island.) The petitioners concede that the constitutional guarantee of freedom of the press does not extend to obscene publications.

Roth v. United States, 354 U. S. 476 (1957)

They do maintain, however, that since the suppression of a publication which is not obscene would be a violation of the constitutional guarantees, the determination of whether such publication is or is not obscene is one which must be made by the courts in accordance with due process

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of law, and not one which may be made by the respondent Commissioners.

The problem of obscenity and how best to deal with it is one which has been with us for a very long time and to which many people have devoted a great amount of study. There have been numerous instances over the years of persons who have become extremely zealous in their attempts to stamp out what they considered obscenity in one form or another. To spell out the names of a number of books which have been the recent subjects of litigation in this field would merely give additional publicity to the type of literature which some of the respondent Commissioners consider obscene. Suffice it to say that even after court trials there is often no uniformity as to what is obscenity. The novel "*Memoirs of Hester County*" was found to be obscene in New York.

Doubleday & Co., Inc. v. New York, 335 U. S. 848
(1948)

Yet a bookseller indicted for selling the same book was acquitted in California. The book "*God's Little Acre*" was held to be obscene in Massachusetts, but not obscene in New York and Pennsylvania.

The mere fact that the problem of obscenity is with us does not mean, however, that we should disregard our constitutional safeguards. Obscenity is not on trial in the case before us. What is at issue is the Resolution which created the Commission and the actions which have been taken by the respondents in carrying out their purpose.

Mr. Chief Justice Warren, in his concurring opinion in the *Roth* case, *supra*, said:

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"That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight states as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem."

Roth v. United States, 354 U.S. 476, 495 (1957).

The respondents take the position here that they have not "banned" any of the books and magazines listed; that they have merely "advised" the distributors and dealers, and that the withdrawal of the books and magazines from circulation has been done voluntarily by Silverstein and the other distributors and dealers. The respondent McAloon testified in cross-examination that after the Commission sent out its notices that certain publications were objectionable it "took no official concerted action" to follow up to see what steps the distributors took. Yet, we have the undisputed evidence that copies of all notices were sent to the chiefs of police, the uncontradicted testimony of the witness Kaplan that he was visited regularly by a representative of the Providence Police a few days after the receipt of each notice to find out what action he had taken, and we have the statement in the Commission's Report of 1960 to the Governor and the General Assembly, stating in part:

"In most cases local distributors have been cooperative this year, withdrawing publications of the type listed in the Commission guide list *and returning them to publishers.*" (Underscoring by the Court.)

All of this is inconsistent with the testimony of Mr. McAloon that the Commission did nothing to find out what the distributors did after they received the notices.

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To say that the action taken by the distributors was voluntary is unrealistic. Here we have notices sent out on letterheads entitled RHODE ISLAND COMMISSION ON YOUTH informing the distributor that this official, public agency, "established by legislative order in 1956" (Petitioners' Exhibit "1") had made a finding that certain books and magazines being sold and delivered by the distributor were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.

"The Chiefs of Police have been given the names of the aforementioned magazines *with the order that they are not to be sold.* * * *" (Petitioners' Exhibit "1"). (Underscoring by the Court.)

Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of the various cities and towns. Yet the respondent McAloon would have us believe that the books and magazines were not "banned" by the Commission, and that the distributors voluntarily cooperated with the Commission. The effect of the notices sent out by the Commission was clearly intimidation. The witness Kaplan testified that Silverstein, upon receiving the notices from the Commission, immediately did four things: (1) refused to take any new orders for the proscribed publications; (2) ceased selling any of the copies on hand; (3) withdrew from the retailers all unsold copies; and (4) returned all unsold copies to the publishers. He stated that this was all done because they did not want to become involved in litigation. His testimony was clear and convincing.

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Petitioners' Exhibit "1" also states:

"The Attorney General will act for us in cases of non-compliance."

What can these words possibly mean to the distributor? They can only mean:

"If you fail to comply with this letter by removing from circulation those magazines or books listed herein, you will be prosecuted by the Attorney General."

This Court can find no other reasonable interpretation of that language.

Language in other notices (e.g. Petitioners' Exhibit "11") carries the same threat in the following language:

"* * * Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."

As another Court said in a similar case:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

American Mercury, Inc. v. Chase, et al., 13 Fed. (2) 224, 225 (1926)

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In another case we find the following language:

"Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive . . . True, as the prosecutor says by way of defense, there was no actual compulsion or threat in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received."

Bantam Books, Inc. v. Melko, 25 N. J. Superior 292 (1953); modified in 14 N. J. 524 (1953)

There is no question but that the activities of the respondents have resulted in the suppression of the sale and circulation of books without any judicial determination as to whether or not they are obscene. The sending of these notices with their implicit threats of criminal prosecution are clear violations of the constitutional provisions guaranteeing freedom of the press.

Contrary to the contention of the respondents in their brief, the petitioners here are not seeking an injunction so as to furnish them with "unlimited license to publish and distribute obscene publications in this State." The petitioners desire freedom to publish, as guaranteed to them by the above-quoted sections of the constitutions of the

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United States and Rhode Island, knowing full well the consequences of their acts if they violate the criminal laws by the publication of obscene books and periodicals.

Let us examine the sixth paragraph of *Resolution No. 73*, as amended, to find out the duties of this Commission. The substance of that paragraph is:

"It shall be the duty of said Commission to educate the public concerning any book, * * * containing obscene, * * * language, as defined in Chapter 11-31 * * *, and to investigate and recommend the prosecution of all violations of said sections, * * *"

Is it possible that even though the actions of the Commission have been violations of the constitutional guarantees, the Resolution itself may be valid? Can there be such "education" of the public without the accompanying implicit threat of criminal prosecution to the distributors and book sellers who refuse to accept the rulings of the commission?

The duty of the Commission is to "educate the public" concerning books containing obscene language and "to investigate and recommend the prosecution of all violations".

It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The Resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal prosecution, the inevitable result is the suppression of books without a judicial determination as to

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whether or not they are obscene. The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island.

Is the fact that a member of this Court is in "considerable doubt as to the constitutionality" of the Resolution sufficient to declare the Resolution unconstitutional? The question of the constitutionality of a legislative act does not depend upon events which transpire after the adoption of the said act.

*The Narragansett Electric Lighting Company vs.
Sabre, et al.* 50 R. I. 288, 303 (1929)

In the same case, our Supreme Court said:

"* * * We have frequently stated that one who attacks the constitutionality of an act of the Legislature has the burden of satisfying the court beyond a reasonable doubt that the act is invalid."

*The Narragansett Electric Lighting Company vs.
Sabre, et al.* supra, at page 298

There is no question but that the Superior Court may either certify constitutional questions to the Supreme Court or may determine them in the first instance.

Haigh et al vs. State Board of Hairdressing, et al. 74 R. I. 106 (1948)

Our Supreme Court in *Allen vs. Rhode Island State Board of Veterinarians, et al.* 72 R. I. 372 (1947), stated at page 377:

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••• As a result of such method of amendment we point out, among other things, that a question concerning the constitutionality of a statute may now be determined, in the first instance at least, by any one of the eleven justices of the superior court and by every justice, assistant justice or clerk authorized to act as a justice of any one of the twelve district courts; that the determination of such question by one of those courts is not binding on the other, so that contrary conclusions on the same question might well be reached; that, in different cases raising the same question, different justices of the same court might decide the question in conflict with each other; and that, subject to the provisions of § 6, as amended, unless a case involving a question of the constitutionality of a statute were brought to this court by appellate proceedings, the determination of such question by the superior or district courts would stand only for the case in which it was made and therefore would not bind all the people of this state."

The Supreme Court of New Jersey has wisely stated:

••• the better practice is for the inferior court to assume that an act is constitutional until it has been passed upon by the appellate court, unless it is so clearly in contravention of the constitution that there can be no reasonable doubt about it, which does not apply to the statute under consideration."

Legg vs. Passaic County, 122 N.J.L. 100; 4 A. 2d 300 (1939)

In view of the above, it appears to this Court that it would be better practice to leave the matter of passing

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upon the constitutionality of *Resolution No. 73* as amended, to our Supreme Court.

The petitioners' petition for a declaratory judgment is granted. A decree may be presented (1) declaring constitutional *Resolution No. 73* as amended; (2) declaring unconstitutional the acts of the respondents in disseminating the above-described notices, their being in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article 1, Section 20, of the Constitution of Rhode Island; (3) permanently enjoining the respondents from continuing the dissemination of such notices.

APPENDIX B

Opinion of Supreme Court of Rhode Island

CONDON, C. J. This is a petition to the superior court for a declaratory judgment under G. L. 1956, chap. 9-30, otherwise known as the uniform declaratory judgments act. The cause is here on the petitioners' appeal from a decree denying a portion of the relief prayed for, and also on the respondents' appeal from such decree granting the petitioners certain other relief which they sought.

The petitioners are Bantam Books, Inc., Dell Publishing Company, Inc., Pocket Books, Inc. and The New American Library of World Literature, Inc., all New York corporations engaged in the business of publishing paper-bound books but not in distributing them in this state. The respondents are the executive secretary and members of the Rhode Island Commission to Encourage Morality in Youth. The commission was created by the general assembly at its January 1956 session by resolution No. 73.

The resolution was amended on May 25, 1959 and as amended it charges the commission as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes,

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and (e) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

In the discharge of such duty as they construed it the commission compiled several lists of publications which upon investigation they deemed "completely objectionable for sale, distribution or display for youths under eighteen years of age" and notified distributors doing business within the state thereof. They also advised these distributors that the lists had been furnished to the police departments throughout the state. They asked for the cooperation of the distributors in removing the objectionable publications and stated that the receipt of such cooperation would eliminate the necessity of the commission recommending prosecution to the attorney general. As a result of such notices the distributor for Bantam Books, Inc. and Dell Publishing Company, Inc. returned a supply of certain paper-bound books published by them and stated the books could not be held for sale because they were listed by the commission as objectionable. The distributor did not object to the commission's action and is not a party to the instant proceedings.

In their petition, petitioners alleged that Resolution No. 73 is an unconstitutional interference with the right of freedom of the press guaranteed by the first amendment to the federal constitution and made applicable to the states by the fourteenth amendment. They also alleged that it is violative of article I, sec. 20, of the constitution of this state guaranteeing such freedom. The petitioners further alleged that as construed by the commission the resolution was unconstitutionally applied by them, that their actions thereunder should be declared null and void.

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and that they should be enjoined from continuing such acts.

The cause was heard by a justice of the superior court without a jury on petition, answer and oral proof as though it were a suit in equity. At the conclusion of the evidence the trial justice decreed (1) that the resolution was constitutional, but (2) that the acts of respondents under their construction of it were unconstitutional in that they were in effect prior restraints of freedom of the press. On that ground they were (3) expressly enjoined by the decree from continuing such acts.

The petitioners contend that the trial justice erred in sustaining the constitutionality of the resolution. In support of such contention they argue that the same reasons upon which he based his finding that the commission's acts were unlawful were equally applicable to the resolution itself. On the other hand respondents, under their appeal, contend that their acts were in accordance with the authority vested in them by the resolution and that since the trial justice could not find it unconstitutional he erred in enjoining them from continuing such acts thereunder.

We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated.

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Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney general. Any unofficial group may do as much in this respect as the commission.

As we view this resolution it does no more than clothe a designated group of individuals with an official status but with little if any more power than to investigate and recommend action by the appropriate authorities where its investigation implicates action is necessary. As such it may well be considered an arm of the legislature to effectuate its policy of preventing the dissemination of obscene literature and conceivably also in the nature of a bureau of investigation in aid of the police and the department of the attorney general in their detection and prosecution of violators of "chapter 11-31 of the general laws."

No case has been cited to us and we are aware of none wherein a similar resolution has been involved and its constitutionality questioned. While the United States supreme court has considered a number of cases involving various forms of state interference with freedom of the press, some of which have been cited by petitioners, none of them was concerned with a provision like resolution No. 73. *Smith v. California*, 361 U. S. 147; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436; *Roth v. United States* and *Alberts v. California*, 354 U. S. 476; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Lovell v. City of Griffin*,

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303 U. S. 444; *Near v. Minnesota et al. v. Olson*, 283 U. S. 697. From our examination of those cases we are of the opinion that the supreme court would not deem such a provision violative of the first amendment as a previous restraint of freedom of the press. In any event unless and until the supreme court so rules we hold that the trial justice did not err in deciding that the resolution was constitutional.

We now come to the question whether he erred in holding that the commission in applying the resolution acted unconstitutionally. The petitioners argue that he did not, and they cite the following cases in support of his decision, *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479; *American Mercury, Inc. v. Chase*, 13 F. 2d 224; *Busey v. District of Columbia*, 138 F. 2d 592; *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823; *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488; *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903; *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292.

None of those cases is by a court of last resort. In each instance the decision is by a single judge of a court of inferior jurisdiction. However, we have nevertheless examined them, not because they have any standing as precedents but solely because of the possibility that the reasoning upon which the court based its decision might help in solving our problem. On examination we find that they are of no assistance. Most of such cases did not present a factual situation like the one in the instant case. In others where the facts were somewhat analogous the reasoning that led the judge to find prior restraint of freedom of the press is not, in our opinion, convincing. Moreover, in most of those cases the judge predicated such findings

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on some unlawful action causing or threatening to cause irreparable injury to the complainant's property.

In the case at bar the evidence discloses no unlawful act on the part of the commission. On the contrary, their acts were in accord with the clearly expressed objectives of the resolution. They were only seeking and received the voluntary cooperation of petitioners' distributor. He was free to disregard their request for cooperation and if he did so he had nothing to fear except prosecution for violating G. L. 1956, chap. 11-31. And even such fear would be groundless if the books in question were not obscene.

It is no justification for petitioners to argue as they do that because the local distributor will not want to oppose the commission such a practice has the inevitable result of suppression of their books by censorship. Enforcement of the law against obscenity is not easy. It is hedged about by constitutional safeguards which in appropriate instances have been strictly applied. But the United States supreme court has repeatedly held that obscenity is not protected by the guarantees of the first amendment. *Near v. Minnesota et rel. Olson*, 283 U. S. 697; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Roth v. United States*, 354 U. S. 476. However, that court has also held that the local distributor or bookseller cannot be convicted of such an offense unless the state proves that he had knowledge of the obscene nature of the book. *Smith v. California*, 361 U. S. 147.

Ordinarily a distributor or bookseller is not expected to know the character of all the books he distributes. It is only fair that he should be given some advance notice of which he may avail himself, if he chooses, before criminal proceedings are commenced against him. It is in that con-

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text we interpret the action of the commission here and the willing response thereto of the distributor. Of course the publisher would much prefer to have the distributor stand his ground and refuse to cooperate regardless of the consequences to him.

The status of the publisher, however, is vastly different from that of the distributor. He may not plead lack of notice. It is his business to know what he is publishing. If his publication on the bookseller's shelf is obscene, he is the real offender and it is his offense which resolution No. 73 seeks to discover and prosecute. But more often than not the publisher is beyond reach of the local law and in effect hides behind the unoffending local distributor.

* When, as in the case at bar, steps are taken to save the local distributor from embroilment in criminal proceeding, the petitioning publishers come forward protesting that the commission is depriving them of their constitutional right of freedom of the press. Their success in a number of jurisdictions in invoking the injunctive remedy has apparently encouraged them to invoke it here in the hope of thwarting the implementation by the commission of resolution No. 73. They rely heavily on the above-cited cases where such successes have been achieved.

However, in the instant case we are of the opinion that they are not aggrieved by any deprivation of their constitutional right to distribute their books in this state. Resolution No. 73 does not by its terms nor by the commission's acts under it prevent them from doing so. Unless their books are obscene they have nothing to fear. But if they are deemed to be obscene by the prosecuting authority of the state they cannot use the injunctive remedy of equity to prevent the state from bringing them to the bar of justice by appropriate criminal proceedings. In such pro-

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ceedings they will have a full, fair and impartial judicial determination of the issue of obscenity.

Obscenity is entitled to no special protection under either the state or federal constitution. In *Chaplinsky v. New Hampshire*, 315 U. S. 568, the supreme court of the United States unanimously declared that lewd and obscene speech raises no constitutional question. At page 572 it said, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

It is the social interest in order and morality that the legislature by enacting resolution No. 73 is seeking to subserve. And the acts of the commission thereunder were in our opinion a reasonable and lawful implementation of the resolution. To tie their hands by the injunction under consideration here would be to render them impotent to discharge the duties that the general assembly has specifically charged them to perform. We are therefore of the opinion that the trial justice erred in decreeing that their actions were unconstitutional and in enjoining them from so acting henceforth.

Before concluding opinion we should comment on *Syrup Book Co. v. McCaffron*, 4 App. Div. 2d (N. Y.) 643, upon which petitioners have also relied. Although that case is not by a court of last resort it does come from a court of appeal having a very large measure of revisory jurisdiction and for such reason its decisions stand on a higher plane of authority than those hereinbefore commented upon. However, we do not think the cited case helps the petitioners since it appears to be based on a factual situation not at all like the one here.

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In that case a license commissioner threatened a licensed newsdealer with revocation of his license if he did not remove certain copies of a magazine from his newsstand. In the instant case no license is involved and the commission neither had any regulatory authority over the distributor nor attempted to exercise any such authority. And in the cited case the license commissioner was not acting pursuant to the provisions of a legislative act imposing upon him specifically the duty of investigating obscene literature and recommending prosecution of violators of the statute law against obscenity. In any event even though the case may impliedly stand for more than it expressly decides we are not persuaded to accept it as authority in the special circumstances here.

The petitioners' appeal is denied and dismissed, the respondents' appeal is sustained in part, the decree appealed from is reversed as to order Nos. 2 and 3; otherwise it is affirmed, and the cause is remanded to the superior court for further proceedings.

ROBERTS, J., dissenting. I concur in the opinion of the majority that resolution No. 73, as amended, is not in its terms repugnant to the guaranties of the first amendment. The legislature has therein provided for an appropriation for the support of a program of public education concerning the deleterious influence of the publication of obscene, lewd, or indecent periodicals on the morals and welfare of youth and for appointment by the Governor of the members of a commission charged with the duty of conducting that program. I perceive no provision therein which would warrant concluding that the legislature contemplated that the commission was being authorized to act to engage in conduct other than that incidental to the program.

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I am not fully persuaded that legislation providing for the dissemination of information relating to a matter of substantial public concern constitutes state action within the purview of the inhibitions of the pertinent constitutional provisions. The commission, as it is therein established, is without authority either to regulate the business that is the subject of the legislation or to accomplish any control over that business through the imposition of sanctions. An exercise of the duties imposed upon the commission therein does not impinge upon any right protected by the first amendment.

However, I am unable to concur in the conclusion of the majority concerning the propriety of the injunctive relief decreed by the trial justice. The respondents here, whatever might be their rights as individuals, may act legally in their capacities as members of the commission only within the authority conferred upon the commission by the resolution. It appears from the record that the commission, or certain of its officers acting in its behalf, has engaged in conduct that is clearly in excess of the authority conferred upon it by the resolution. Such action, to the extent that it exceeds the authority conferred, is illegal and may, upon a showing of the requisite equitable grounds, be enjoined.

The action upon which this finding of illegality is predicated relates to the circulation of notices to dealers in books and publications wherein the commission identifies certain books that it deems to be objectionable for sale or distribution for use by youths under the age of eighteen. The circulation of these notices, standing alone, was in my opinion action pursuant to the dissemination of information contemplated in the resolution. There is, how-

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ever, further evidence tending to establish that the circulation of this information was implemented at the commission's instigation by a police surveillance of the stocks in the possession of these dealers which caused certain of them to withdraw the books so identified from sale generally. Of this the trial justice said: "The sending of these notices with their implicit threats of criminal prosecution are clear violations of the constitutional provisions guaranteeing freedom of the press." I am not persuaded, however, that it is necessary to pass upon the constitutional issue, it being my opinion that the action to which the trial justice refers was beyond the power conferred upon the commission and, therefore, illegal.

There is in the record evidence which is concerned with the authority that the commission through its officers purported to exercise that buttresses the conclusion which I here reach. In what appears to be a circular letter dated July 19, 1937 over the signature of the executive secretary of the commission, dealers in books and publications were told: "This agency was established * * * with the immediate charge to *prevent* the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age." (italics mine) In another undated circular letter over the signature of the executive secretary of the commission, the assertion was made that certain amendatory legislation operated to "broaden the powers of this Commission; giving us broad investigative powers * * *." It is my opinion that the two examples above set out suffice to reveal that the commission or its officers substantially misconceived the purpose for which resolution No. 73 was enacted as well as the extent of the authority conferred upon the commission by the terms of that legislation.

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After a thorough examination of the resolution I cannot find therein any language which either in express terms or by reasonable inference confers upon the commission or its officers authority to *prevent* the sale or distribution of any publication. The statement contained in the circular letter of July 19, 1957 constitutes an entirely unwarranted assumption that the commission was vested with power to *prevent* the sale of such publications. Neither do I find in the resolution any provision from which it may be reasonably assumed that the commission or its officers were invested with investigative powers. The language of the resolution providing that the commission make recommendations to prosecute violations of criminal statutes concerned with obscenity confers no inquisitorial power or, for that matter, any power to institute a criminal proceeding. It is my opinion that to so construe the provision referred to would be to clearly violate our well-settled rules of statutory construction.

It is my opinion then that the commission, or its officers acting in its behalf, in purporting to act pursuant to the authority conferred by resolution No. 43 has engaged in conduct that exceeded the authority in fact conferred and to that extent its action was illegal. For this reason I am constrained to dissent from the conclusion of the majority that the trial justice erred in granting the injunctive relief.

APPENDIX C
Decree of Superior Court

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

[SAME TITLE]

This cause came on to be heard on the Petition of BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC., praying for a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, Edition of 1956, as amended), wherein the Petitioners seek to have Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, as amended, declared unconstitutional, and wherein the Petitioners seek to have certain actions of the Respondents declared unconstitutional. After hearing thereon, arguments of counsel, and written Briefs, the following findings of fact are made:

1. The Petitioners, four New York corporations, are publishers of paper bound books, which are and have been for a long period of time distributed in the State of Rhode Island.
2. The Respondents are the present members and the Executive Secretary of the Rhode Island Commission to Encourage Morality in Youth.
3. The said Commission was created pursuant to Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, and approved

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April 26, 1956. The said Resolution was amended by S. 444 of the General Assembly on May 25, 1959.

4. The Respondents sent notices to various book and magazine wholesale distributors and retailers in the State of Rhode Island, some of which notices are Petitioners' Exhibits "1" to "16" inclusive.

5. The said notices informed said book and magazine wholesale distributors and retailers that the books and magazines listed therein had been reviewed by the Commission, and that by majority vote the Commission had declared them to be objectionable for sale, distribution or display for youths under eighteen years of age.

6. Petitioners' Exhibit "6" is such a notice sent by Respondents with reference to "PEYTON PLACE", a paper bound book published by Petitioner Dell Publishing Company, Inc., and Petitioners' Exhibit "14" is a similar notice with reference to "THE BRAMBLE BUSH", a paper bound book published by Petitioner Bantam Books, Inc.

7. Copies of said notices were sent by Respondents to the Chiefs of Police of the various cities and towns in the State of Rhode Island.

8. The effect of the said notices were clearly to intimidate the various book and magazine wholesale distributors and retailers and to cause them, by reason of such intimidation and threat of prosecution, (a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers.

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9. The activities of the Respondents have resulted in the suppression of the sale and circulation of the books listed in said notices without any judicial determination as to whether or not they were obscene.

10. The sending of said notices by Respondents, with their implicit threat of criminal prosecution, is a clear violation of the constitutional provisions guaranteeing freedom of the press, as set forth in Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article 1, Section 20, of the Constitution of Rhode Island.

11. Though there is considerable doubt as to the constitutionality of Resolution No. 73, as amended, it would be better practice to leave the matter of passing upon the constitutionality of said Resolution No. 73, as amended, to the Supreme Court, for the reasons set forth in the written Decision of this Court.

WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

1. That Resolution No. 73, as amended is constitutional.
2. That the acts of the Respondents in disseminating said notices concerning books and publications are hereby declared unconstitutional.
3. That Respondents, and each of them, their agents, servants, and employees, and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, dis-

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tribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances.

Entered as the Decree of this Court this day of
, A.D., 1961.

Enter:

/s/ MACKENZIE, J.
3/2/61

Per Order:

/s/ THOMAS A. PALANGIO, Asst. Clerk
3/3/61

Assented to: as to form:

/s/ J. Joseph Nugeht, Attorney General

/s/ Joseph L. Breen
Attorneys for Respondents

/s/ Abedon, Michaelson and Stanzler
Attorneys for Petitioners

APPENDIX D**Final Decree of Superior Court Pursuant to Remand by
Supreme Court of Rhode Island**

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

[SAME TITLE]

This cause came on to be heard on the Petition of BANTAM Books, Inc., Dell Publishing Company, Inc., POCKET Books, Inc., and THE NEW AMERICAN LIBRARY of World Literature, Inc., praying for a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act (Title 9, Chapter 30, General Laws of Rhode Island, 1956, as amended), wherein the petitioners seek to have Resolution No. 73, adopted at the January, 1956, Session of the Rhode Island General Assembly, as amended, declared unconstitutional, and wherein the petitioners seek to have certain actions of the respondents declared unconstitutional.

WHEREAS on the 2nd day of March, A. D., 1961 a Decree was entered herein ordering, adjudging and decreeing:

1. That Resolution No. 73, as amended, is constitutional.
2. That the acts of the respondents in disseminating the notices referred to in said decree concerning books and publications are hereby declared unconstitutional.
3. That respondents, and each of them, their agents, servants and employees, and their successors in office, be at 1/ they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them,

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either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in such Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances, and

WHEREAS the petitioners appealed to the Supreme Court of the State of Rhode Island from order No. 1 of said decree and the respondents appealed thereto from orders Nos. 2 and 3 thereof, and

WHEREAS the said Supreme Court of Rhode Island by its decision upon said appeals directed that the petitioners' appeal be denied and dismissed and that the respondents' appeal be sustained in part to the extent of reversing orders Nos. 2 and 3 and otherwise affirming said decree and remanding the cause to this Court for further proceedings,

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

1. That Resolution No. 73, as amended, is constitutional.
2. That the acts of the respondents in disseminating the notices concerning books and publications distributed in the State of Rhode Island referred to in the decree appealed from are hereby declared constitutional.

Entered as a Decree of this Honorable Court this 18th day of January, A. D., 1962.

Entered:

/s/ MACKENZIE

1-18-62

Per Order:

/s/ THOMAS A. PALANGIO

Ass't. Clerk

APPENDIX E
STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 555 684

RANDOM HOUSE, Inc., a New York corporation,

Plaintiff.

vs.

**CITY OF DETROIT, a Municipal corporation, CITY OF DETROIT
METROPOLITAN POLICE DEPARTMENT, EDWARD S. PIGGINS and
MELVILLE E. BULLACH,**

Defendants.

OPINION

This action is brought by plaintiff for a permanent injunction (1) directing defendants to withdraw the ban against the sale in Detroit of the hard-bound edition of the book TEX NORTH FREDERICK; (2) enjoining defendants, their agents and subordinates, from directly or indirectly ordering any person engaged in the sale of the book to discontinue sale thereof, and from making any threat of prosecution, explicit or implicit, to any person selling the book by reason of their sale, distribution or display for sale thereof; the aforesaid relief, however, not to impose any restraint upon defendants' lawful duties of law enforcement by prosecution.

The matter is before the Court on an application for a preliminary injunction.

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There is no dispute as to the facts. Plaintiff, a New York corporation, in 1955 published the hard-bound edition of the book **TEX NORTH FREDERICK**. The book was awarded the National Book Award as being the outstanding novel of 1955 and was on the national best-seller lists for 32 weeks. Plaintiff has sold in excess of 100,000 copies of the book throughout the United States.

Defendant Piggins is the Chief of Police of the City of Detroit, and defendant Bullach is an Inspector and Head of the Censor Bureau of said Police Department. In or about the middle of January, 1957 defendants Piggins made a public announcement to the effect that the book **TEX NORTH FREDERICK** was obscene and thereafter defendant Bullach notified booksellers in the City of Detroit that the sale of the book would lead to arrest and prosecution. Since then the book has not been sold by book sellers in the City of Detroit.

Plaintiff contends that the foregoing acts on the part of defendants Piggins and Bullach were in excess of the authority conferred upon them by law and constituted an illegal banning and suppression of the book **TEX NORTH FREDERICK**, as a result of which plaintiff has been irreparably injured in violation of its constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. Defendants, on the other hand, contend that they acted within the statutory powers conferred upon them by the Michigan state statute and the Detroit municipal ordinance, both prohibiting the sale of obscene publications.

This Court is constrained to disagree with the defendants' position. We are here dealing with the precious constitutional right of a free press.

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"Freedom of the press is not limited to freedom to publish, but includes the liberty to circulate publications, which the Supreme Court has said 'is as essential to that freedom as liberty of publishing.' Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 669, 82 L. Ed. 949. In the Lovell case the court again stressed the importance of protecting freedom of the press 'from every sort of infringement'. See also Near v. State of Minnesota, 283 U. S. 697, 61 S. Ct. 625, 45 L. Ed. 233, 56 S. Ct. 444, 80 L. Ed. 660; De Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278. Freedom of the press, together with freedom of speech and freedom of religion, occupy a 'preferred position' among our constitutional guarantees. Marsh v. State of Alabama, 1946, 326 U. S. 501, 509, 66 S. Ct. 276, 90 L. Ed. 265; Jones v. City of Opelika, 1943, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290; Murdock v. Com. of Pennsylvania, 1943, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292; Martin v. City of Struthers, 1943, 319 U. S. 144, 63 S. Ct. 862, 87 L. Ed. 1313. That preferred position gives these guarantees 'a sanctity and a sanction not permitting dubious intrusions.' Thomas v. Collins, 323 U. S. 516, at page 530, 65 S. Ct. 315, 89 L. Ed. 430. * * * Censorship in any form is an assault upon freedom of the press. 'A censorship that suppresses books in circulation is an infringement of that freedom.' (*New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 832, 833; U. S. Dist. Ct., N.D. Ohio, E. D. 1953).

Neither the Michigan statute nor the Detroit municipal ordinance under which defendants have claimed to act, clothed defendant Piggins, as Police Chief of the City of Detroit, or defendant Bullach, as Head of the Censor Bureau, with power to censor or ban the sale of any books.

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The sole authority granted to defendants Piggins and Bullach under the Michigan statute or the Detroit ordinance is to order the arrest of any person selling a book where there is probable cause that such sale violates the obscenity laws. In the event of such an arrest, it would then devolve upon a court of competent jurisdiction to determine whether or not the book violates the obscenity statute or ordinance, thus guaranteeing a judicial determination in accordance with the constitutional requirements of due process. If, after such a judicial determination, the book were found to be obscene, a legal ban on its sale would then ensue. Here, however, defendants Piggins and Bullach have circumvented the judicial process and have effected such ban upon the sale of the book by their non-judicial determination that the book is obscene, their announcement of the fact, and their notifying booksellers that the sale of the book would lead to prosecution. Such conduct on the part of said defendants is beyond the scope of their lawful authority and violates plaintiff's constitutional rights under the First and Fourteenth Amendments to the constitution of the United States.

In a similar situation (*New American Library v. Allen*, supra, pp. 833, 834) the United States District Court of Ohio issued an injunction against the Police Chief of the City of Youngstown. The Court there said,

"The defendant was without authority to censor books. Such a drastic power can be vested in a police officer only by a valid express legislative grant. As Chief of Police it was defendant's duty to examine the suspected publications to determine whether there was probable cause for prosecution. He was without authority to determine with finality

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whether the books were obscene or immoral in violation of the ordinance. In the event prosecutions were undertaken, the burden would rest upon the city officials to establish by proof beyond a reasonable doubt every element of the offense, including the obscene or immoral nature of the books. Until a court of competent jurisdiction adjudged a book to be obscene or immoral, there would exist no warrant in law for its suppression."

In *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479, Federal Judge Westenhaver issued an injunction against the Mayor and Chief of Police of Cleveland who were acting under color of an ordinance proscribing the sale of obscene and scandalous literature. Judge Westenhaver there said (p. 482):

"The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene or scandalous; but, if it were, the limit of the city's power would be to conduct the prosecution for the specific offense thus committed."

See, also *Bantam Books, Inc. v. Melko*, 25 N.J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N.J. 524, 103 A. 2d 256.

Nor can defendants Pergins or Bullach successfully argue that their conduct did not constitute a banning of the book. The fact remains that after these defendants made their announcement that the book is obscene and notified booksellers that its sale would subject a seller to prosecution, booksellers in Detroit stopped selling the book. To say that such stoppage of sale, in the light of defendants' announcement and notification, was a *volumetric* act on the part of booksellers is to fly in the face of realism.

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Like arguments have been struck down by the courts. In *Bantam Books, Inc. v. Melko*, supra, the Court said:

Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive . . . True, as the prosecutor says by way of defense, there was no actual compulsion or threat in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received.

Similarly, in *American Mercury, Inc. v. Chase*, 13 F.2d, 224, 225, the Court said:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Defendants have urged as an additional defense to this motion that the book *TEX NORTH FREDERICK* is obscene. The question of the obscenity or non-obscenity of the book

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is not involved in this case. Plaintiff's right to an injunction does not depend upon the contents of the book. Plaintiff's right stems from the fact that these defendants have illegally banned the sale of plaintiff's book by exercising powers beyond those delegated to them by the statute and ordinance under which they acted.

It is fundamental that equity will intervene to prevent an official from transcending his power where, in so doing, he causes or threatens to cause irreparable injury to property or civil rights.

This principle was forcibly expressed by Federal Judge McNamee in *New American Library v. Allen*, 114 F. Supp. 823, 831 (U. S. Dist. Ct., N. D. Ohio, E. D. 1953), as follows:

"Where public officers charged with the enforcement of a valid criminal law exceed their lawful powers and by arbitrary action cause or threaten to cause irreparable injury to property rights or civil rights of the complainant, equity will intervene." 28 Am. Jr. 373, See, 185; id. 421, See, 238; 43 C.J.S., Injunctions, See, 111, p. 634."

See also:

Wetherby v. City of Jackson, 264 Mich. 146, 249 N. W. 484, 485.

Grosse Pointe Fire Fighters Ass'n v. Village of Grosse Pointe Park, 303 Mich. 405, 6 N. W. 2d 725, 727.

Bantam Books, Inc. v. Melko, 25 N. J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N. J. 524, 102 A. 2d 256.

Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479

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Plaintiff has been deprived of a property right without due process of law. It has suffered loss incapable of accurate measurement in an action at law. Accordingly, plaintiff has sustained irreparable injury and is threatened with further loss.

For the reasons above set forth, the Court holds that the conduct of defendants Piggins and Bulkach in ordering the suppression of plaintiff's book under threat of arrest and prosecution of the booksellers was in excess of their lawful powers under the Michigan statute and the Detroit ordinance. An order may be entered herein restraining the defendants, pending the trial of this action, from engaging in such unauthorized conduct. No restraint, however, is imposed upon defendants' power to enforce the statute of the State of Michigan or the ordinance of the City of Detroit by prosecution.

s / Carl M. Weideman
Circuit Judge

Mar. 29, 1957

A True Copy

EDGAR M. BRANIGAN
Clerk

Office-Supreme Court, U.S.
FILED

SEP 20 1962

IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC.,

Appellants.

—v.—

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT McAloon, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

IRWIN KARP

*Attorney for the Authors
League of America, Inc.,
Amicus Curiae*

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IN THE
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Appellants,

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JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

**BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.
AS AMICUS CURIAE**

The Interest of the Authors League

The Authors League of America, Inc. is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

The Authors League files this brief in support of the appeal by Bantam Books, Inc. et al. from the decision of the Supreme Court of Rhode Island upholding Resolution No. 73 because it believes that the Resolution establishes a method of restricting the distribution of books that is utterly repugnant to the First Amendment and a serious threat to the rights of free speech and free press.

We respectfully submit that, as appellants contend, Rhode Island's Resolution No. 73 is unconstitutional because it restrains the distribution of all books (obscene and non-obscene) that are condemned by the Commission, through the threat that dealers who sell the proscribed publications will be prosecuted.

Moreover, even if the Commission's pronouncements and activities did not convey (explicitly and implicitly) the threat of prosecution, the Resolution violates the First Amendment because: (i) It imposes a restraint on the distribution of books by attempting to indirectly eliminate the element of *scienter* from Rhode Island's obscenity laws and (ii) the publication and distribution of the Commission's lists is, *per se*, a restraint on free speech prohibited by the First Amendment.

* Rhode Island Commission to Encourage Morality in Youth.

I.

Resolution No. 73 is unconstitutional because it seeks indirectly to remove the requirement of *scienter* from Rhode Island's obscenity statutes.

There is no question that the preparation and publication of the Commission's lists was the direct consequence of the Legislature's mandate, expressed in Resolution No. 73. The Commission's task is not to educate on the general subject of obscenity or to uplift the standards of literature. On the contrary, under the explicit command of the Resolution its "duty" is "to educate the public concerning any book" (i.e. specific book) that it judges to contain obscene language in violation of the State's criminal obscenity laws (and to recommend prosecution of violations of the laws). "Education" is used in the sense of publicly identifying and labelling any such book.

The Resolution thus necessarily required that the Commission perform its assigned duty by distributing to book-sellers and wholesalers lists of (or otherwise publicizing) the books that it decides contain matter prohibited by the State's obscenity laws. Under the Resolution, moreover, the Commission has unlimited power to list a book, although it had not previously been adjudicated obscene by a Court, in a trial complying with the requirements of due process.

The publication of the Commission's lists has the same effect as did that provision of the California statute struck down in *Smith v. California*, 361 U. S. 147, which failed to require *scienter* as an element of California's criminal obscenity laws.

In *Smith v. California* the Court ruled the statute unconstitutional because a restraint would be imposed upon the distribution of books if booksellers could be held responsible under the obscenity laws although they had no personal knowledge that an offending book was obscene. The Court declared:

"For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature" (at p. 153).

Resolution No. 73 attempts to accomplish the same purpose as the California statute—traveling a slightly different path. It is apparent that the Resolution is intended as a device for placing booksellers on notice as to the "obscene" content of works on the Commission's list, thus seeking to establish their knowledge of the book's obscenity for any subsequent prosecution under the Rhode Island criminal obscenity laws.

That the Supreme Court of Rhode Island understood that the purpose of the Resolution, and its lists, was thus to give the bookseller "some advance notice" of the "character" of the books he distributes, "before criminal proceedings are commenced against him", is indicated by the following statement from its opinion:

"Ordinarily a distributor or bookseller is not expected to know the character of all the books he distributes. It is only fair that he should be given some advance notice of which he may avail himself, if he chooses, before criminal proceedings are com-

menced against him. It is in that context we interpret the action of the commission here and the willing response thereto of the distributor (Tr. 134).

• • • • •

"When as in the case at bar, steps are taken to save the local distributor from embroilment in criminal proceedings the petitioning publishers come forward protesting that the commission is depriving them of their constitutional right of freedom of the press" (Tr. 135).

The statement of this Court in *Smith v. California*, quoted above, is applicable to the Rhode Island statute. If a Rhode Island bookseller may be charged in a criminal proceeding with knowledge that a book was obscene because it had previously been listed on the Commission's index, he will "tend to restrict the books he sells" to those which are not listed by the Commission; and Rhode Island thus:

"will have imposed a restriction on the distribution of constitutionally protected as well as obscene literature."

The fact that the State might not ultimately be permitted to rely on the Commission's list to establish *scienter* in a criminal trial would not lessen the restrictive effect of the threat that the presumption could be invoked; any more than the fact that the California statute could not be upheld in actual application lessened its restrictive effect until it was declared unconstitutional. Faced with the possibility that he will be held to "know" that any book on the list is obscene, the bookseller will impose that "self-censorship" which this Court observed in *Smith v. California*,

supra, was a "censorship affecting the whole public, hardly less virulent for being privately administered."

One evil of devices such as the Rhode Island Commission's list is that they are aimed at the bookseller who is a vital factor in the distribution of books; and yet one whose "timidity" in the face of possible prosecution makes him most sensitive to these restrictive measures. An individual bookseller cannot afford the cost of defending himself against charges of obscenity as to one, or a few, of the hundreds of books he sells (or the risk of jail or fine, if his judgment is wrong). His stake in these books is too small. His only and natural choice, when the State adopts measures which increase the likelihood of his conviction—whether by eliminating *scienter*, or creating a presumption of *scienter*, is to discontinue selling any book that is under suspicion; and certainly any book placed on an "official" index issued by a State agency.

Such forms of restraint as the Commission's lists are insidious because they are elusive. The publisher of a proscribed book cannot meet or answer the State's effort at restraint because it is not open and direct, as it would be in a prosecution under the obscenity laws or in a proceeding for an injunction. And, the lists can be used with deadly effect by the police and prosecuting officials in surreptitious campaigns to suppress the sale of books.

II.

A State may not condemn particular books as obscene, by legislative or administrative pronouncement.

We respectfully submit that even without explicit or implicit threats of prosecution—Resolution No. 73 is in direct violation of the First Amendment to the Constitution.

(i) In *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General et al.*, 341 U. S. 123, Mr. Justice Black said:

"More fundamentally, however, in my judgment the executive has no 'constitutional' authority, with or without a hearing, officially to prepare and publish the lists challenged by petitioners. In the first place, the system adopted effectively punishes many organizations and their members merely because of this political beliefs and utterances, and to this extent smacks of a most evil type of censorship. This cannot be reconciled with the First Amendment as I interpret it. See my dissent in *American Communications Assn. v. Douds*, 339 U. S. 382, 445. Moreover, officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. U. S. Const., Art. I, §§ 9, 10" (pp. 143-144).

We submit that these objections apply with greatest force, when, as here, the State extends such a method directly to books and speech, as such.

Rhode Island has reached back in time to select one of the favorite and most effective devices of censorship—the index of objectionable books. The primary and obvious purpose of such lists has always been to prevent the public from reading them. If a State, or the Federal Government, can take such action with respect to books that have not been convicted of obscenity, and are therefore protected by the First Amendment, there is no reason why it cannot apply the same device to books objectionable on any ground—whether they deal with sex in an unacceptable manner, or with unorthodox political ideas, or the theory of Evolution. To permit the State to adopt this repressive measure is not simply to leave the “door barring federal and state intrusion *** ajar”, but to remove it completely from its hinges.

(ii) Undoubtedly the publication of official lists of proscribed books by the State, or its agencies, will, without any accompanying threat of prosecution, limit the distribution of any book thus cited. Booksellers would refuse to sell it. And, it is obvious that many individuals will give full credence to such an official condemnation of a book, and not read it. Criticisms of a book, or requests not to read it, by a private religious, social or educational organization are protected by the First Amendment; and are part of the “give-and-take” which is envisaged by the concept of free speech. But there is a vast difference between private opinion and governmental opinion. The First Amendment did not envisage, nor does it protect, official criticism by the State or any effort on its part to discourage its citizens from reading particular books.

The public can recognize that criticism of a book by a private group represents only its viewpoint—and that there are others. Publishers or others defending the book can meet such criticism on the same level of authority. No one of these views has any greater sanction than another in our pluralistic society. But when criticism and condemnation emanate officially from the Government, there is no "give-and-take". And it would be unrealistic to assume that any response from individuals or private groups carries with it equal weight of authority. History teaches too clearly that the pronouncement of "official" criticisms or condemnations of speech by a State inevitably produces orthodoxy and conformity of viewpoint that are inimical to free speech.

(iii) Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. Metzger* also said:

"This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society" (at p. 168).

The official lists published by authority of Resolution No. 73 condemn the cited books as violations of the State's obscenity laws and thus identify their publishers as individuals (or concerns) engaged in practices made criminal by these laws. This action is taken without notice, hearing or compliance with the other requirements of due process.

Even more, as appellants contend, the Commission's action is tantamount to a finding of obscenity—by methods other than judicial determination. We submit that appellants are correct in their contention that the determination of obscenity can only be made by a court. The rights of free speech and press would be sharply curtailed if the trial of the issue of obscenity could be shifted from the courts to administrative agencies.

As appellants urge, the issue of whether a book is obscene necessarily involves a constitutional question; it determines whether the First Amendment will or will not protect the author, publishers and seller of the challenged work. And, the question must necessarily be determined by applying the rules of law and construction established by this Court. We respectfully submit that a reading of recent decisions, both in the federal and state courts, makes it only too clear that the application of those rules can only be entrusted to a Court, and if the question could be determined in the first instance by Commissions or other bodies composed of laymen, that the right of free press and speech would not be as zealously guarded and publishers, booksellers and authors could not be assured of the protection of these rights until they had, by appeal, reached the courts and the sanctuary of proper judicial determination of the term "obscene". The cost of meeting the challenge on this basis—community by community, state by state is so overwhelming, that a given book could be effectively suppressed in many states without a Court even determining the issue.

III.

Resolution No. 73, and the activities of the Commission it established, impose an unconstitutional restraint on the distribution of books, grounded on an implicit threat of criminal prosecution.

Undoubtedly the Commission's official index of objectionable works conveyed to book dealers the threat that persons selling these titles would be subject to criminal prosecution. An official pronouncement from a State agency that it had found the book "objectionable" or "obscene" it would naturally carry that connotation to the average reader. And, certainly any bookseller reading the text of the Resolution (and the Commission thoughtfully distributed copies) would conclude that the penalty for ignoring the Commission's lists was criminal prosecution, since Resolution No. 73 couples in one paragraph a direction to the Commission "to 'educate the public concerning any book'" containing obscene language as defined in various sections of Rhode Island's criminal obscenity law and a command "to investigate and recommend prosecution of all violations" of these sections.

The Supreme Court of Rhode Island recognized that the basic purpose of the Resolution was to restrain the circulation of books condemned by the Commission. It said that if the publisher's

"publication on the bookseller's shelf is obscene, he is the real offender and it is his offense which resolution No. 73 seeks to discover and prosecute" (Tr. 135).

Moreover, as appellants' brief amply demonstrates, the Commission by correspondence, publicity and the activi-

ties of police officials conveyed the very forceful and direct threat that retailers who continued to sell the books proscribed on its lists would be prosecuted (Appellants' Brief, pp. 8-14, 20-22).

CONCLUSION

It is respectfully submitted that the Resolution No. 73 of the Rhode Island General Assembly should be declared unconstitutional.

Respectfully submitted,

IRWIN KARP

*Attorney for The Authors
League of America, Inc.,
Amicus Curiae*

120 Broadway

New York 5, N. Y.

Certificate of Counsel

I hereby certify that I am counsel for the *amicus curiae* The Authors League of America, Inc., and that the foregoing brief in support of the appeal is in my opinion well founded in law and fact—and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

IRWIN KARP

*Attorney for The Authors
League of America, Inc.,
Amicus Curiae*

120 Broadway

New York 5, N. Y.

Letters of Consent

(Letterhead of)

STATE OF RHODE ISLAND

DEPARTMENT OF THE ATTORNEY GENERAL

July 30, 1962

Irwin Karp, Esquire
Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, N. Y.

Re: Bantam Books Inc. et al vs. Rhode Island Commission to Encourage Morality in Youth.
Supreme Court of the United States—October Term No. 118

Dear Mr. Karp:

We have no objection to filing a brief *amicus curiae* by counsel for Authors' League of America, Inc., in the above-captioned matter. In this assent or consent to such filing, we intend no trespass upon the right of the Court to select *amici* as it sees fit. And our assent or consent to filing a brief *amicus curiae* do not reflect any view of ours as to the importance of the "issues involved".

Very truly yours,

/s/ J. JOSEPH NUGENT
J. JOSEPH NUGENT,
Attorney General

ebc

(Letterhead of)

WEIL, GOTSHAL & MANGES

August 2, 1962

Irwin Karp, Esq.,
Hays, St. John, Abramson & Heilbron, Esqs.,
120 Broadway,
New York 5, N. Y.

Re: Bantam Books, Inc. et al v. Rhode Island Commission on Youth—Supreme Court of the United States—October Term 1962, No. 118

Dear Mr. Karp:

This is in response to your letter of July 19th in which you, as counsel to the Authors League of America, Inc., request my consent to the filing of a brief *amicus curiae* in the Supreme Court of the United States by the Authors League in support of the position of Bantam Books, Inc., et al.

I hereby consent to such filing and authorize you to use this letter in advising the Court that I have granted such consent.

Very truly yours,

/s/ HORACE S. MANGES

HSM:HW

(Letterhead of)

ABEDON, MICHAELSON AND STANZLER

July 23, 1962

Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, New York

Re: Bantam Books, Inc. et al v. Rhode Island Commission on Youth—Supreme Court of the United States—October Term, No. 118

Attention: Irwin Karp

Gentlemen:

I herewith consent to the Authors League of America filing the Brief Amicus Curiae in the above-entitled matter which will be heard before the Supreme Court of the United States in the October term.

You may use this letter to advise the Court of my consent.

Very truly yours,

/s/ **MILTON STANZLER**
Milton Stanzler

MS:ca

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC.,

Appellants,

v.

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

APPELLANTS' BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

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Opinions Below

The opinion of Justice William M. Mackenzie of the Superior Court of the State of Rhode Island is not reported (R. 112-122). The majority and dissenting opinions of the Supreme Court of the State of Rhode Island, four judges participating, are reported in 176 A. 2d 393; (majority opinion, R. 130-136; dissenting opinion, R. 137-139).

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Jurisdiction

In February 1960, Appellants, publishers of paperbound books distributed in Rhode Island, filed a petition to the Superior Court of the State of Rhode Island for a declaratory judgment pursuant to The Uniform Declaratory Judgments Act of Rhode Island (R. 1-9). In this petition Appellants prayed for judgment as follows:

A. Declaring that Resolution No. 73 (which created the Rhode Island Commission to Encourage Morality in Youth, of which Appellees are the members and executive secretary), as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island, and

B. Declaring that the acts and practices of Appellees in purported performance of their duties as members of the Rhode Island Commission to Encourage Morality in Youth, as alleged in such petition, have violated and violate the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island and enjoining Appellees, their agents, servants and employees, from continuing those acts.

After a trial in the Superior Court of Rhode Island before Justice William M. Mackenzie, and the rendition by the Justice of his opinion (R. 112-122) a decree was entered on March 2, 1961 in said Superior Court (R. 123-125).

That decree, to the extent here pertinent, reads as follows:

"Wherefore, it is hereby Ordered, Adjudged and Decreed:

1. That Resolution No. 73, as amended, is constitutional.

2. That the acts of the Respondents (i.e., the Appellees) in disseminating said notices concerning books and publications are hereby declared unconstitutional.

3. That Respondents, and each of them, their agents, servants and employees, and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances" (R. 125).

Both sides appealed from the aforesaid decree to the Supreme Court of Rhode Island. Appellants from so much thereof as declared Resolution No. 73, as amended, to be constitutional (R. 126) and Appellees from the remainder thereof (R. 127-128).

The Supreme Court of Rhode Island by its majority opinion denied and dismissed Appellants' appeal, and sustained Appellees' appeal to the extent of reversing Orders Nos. 2 and 3 hereinabove quoted; it remanded the cause to the Superior Court for further proceedings for the

purpose of entering a final decree in accordance with said opinion (R. 136).

On January 18, 1962, the Superior Court of Rhode Island, as required by Rhode Island practice,* entered a final decree in accordance with the aforesaid opinion of the Supreme Court (R. 140-141).

The notice of appeal to this Court from such final decree was filed in the Superior Court of Rhode Island on March 16, 1962 (R. 142-144).

This Court noted probable jurisdiction by order dated June 25, 1962 (R. 145).

The statutory provision conferring on this Court jurisdiction of this appeal is Title 28, United States Code, Section 1257 (2):

Statute Involved

The statute here involved is Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, as amended May 25, 1959 by Resolution No. 95 (sometimes referred to as S-444) of the said General Assembly.

Resolution No. 73 (Acts and Resolves 1956) reads as follows:

RHODE ISLAND

1102 JANUARY SESSION, 1956

No. 73 H 1000—Approved April 26, 1956

RESOLUTION creating a commission to encourage morality in youth.

Resolved, That a commission be and it is hereby created, consisting of 9 members to be appointed by the governor, one of whom he shall designate as chairman.

* *Testa v. Katt*, 330 U. S. 386, 389 footnote 3 (1947).

Forthwith upon the passage of this resolution, the governor shall appoint 1 member to serve until the 1st day of March, 1957, 1 member to serve until the 1st day of March, 1958, 1 member to serve until the 1st day of March, 1959, and 1 member to serve until the 1st day of March, 1960, and 1 member to serve until the 1st day of March, 1961. During the month of February, 1957, and annually thereafter, the governor shall appoint a member to serve for a term of 5 years commencing with the 1st day of March then next ensuing and until his successor has been appointed and qualified to succeed the member whose term will then next expire.

Vacancies on said commission shall be filled for the unexpired term of the member or members being succeeded.

Any member shall be eligible to succeed himself.

Forthwith upon the passage of this resolution the commission shall meet and organize.

*[It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined in sections 13, 47, 48 and 49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections 13, 47, 48 and 49 of said chapter 610, as amended.]

Said commission may employ such assistants, experts, and other personnel as may be necessary in the proper exercise of its duties hereunder.

The members of said commission shall serve without compensation but shall be allowed their necessary and travel expenses, and shall report annually during the month of January to the governor and the general assembly as to their activities and findings; and be it further

* Replaced by Resolution No. 95 appearing at page 6.

Resolved, That the general assembly shall annually appropriate such sum as may be necessary to carry out the purposes of this resolution; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated; and be it further

Resolved, That for the purpose of carrying out the provisions of this resolution for the period ending June 30, 1957, the sum of \$10,000.00 be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated.

Resolution No. 95 (Acts and Resolves 1959) amended the sixth paragraph of Resolution No. 73 to read as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and or treatment which would ameliorate or eliminate said causes."

Questions Presented

1. Does Resolution No. 73, creating the Rhode Island Commission to Encourage Morality in Youth, as amended by Resolution No. 95, tend to suppress or inhibit the circulation of books in Rhode Island in violation of the First and Fourteenth Amendments to the Constitution of the United States?
2. Did the acts and practices of the Appellees, the members and executive secretary of the Rhode Island Commission to Encourage Morality in Youth, in purported compliance with the duties imposed upon them by Resolution No. 73; as amended, in notifying booksellers and chiefs of police that the Commission had found certain specified books to be objectionable for sale, distribution or display to youths under 18, tend to suppress or inhibit the circulation of books in Rhode Island, and did they in fact suppress such circulation of books in Rhode Island without judicial determination that the books so suppressed are obscene, in violation of the First and Fourteenth Amendments to the Constitution of the United States?

The Facts

The uncontradicted facts material to the consideration of the questions presented, as established at the trial, are as follows:

Appellants are publishers of paper-bound books, which for many years have been and are now being distributed in Rhode Island (R. 17, A. 9-10; 12-13).

Appellees are members of the Rhode Island Commission to Encourage Morality in Youth (hereinafter referred to as the "Commission"), except Appellee Albert McAloon, who is its executive secretary (R. 9, Appellees' Answer to Petition, par. 3; R. 52, A. 68).

Max Silverstein & Son (hereinafter referred to as "Silverstein"), of 2 Lancaster Street, Providence, for many years has been and is now the exclusive wholesale distributor for Appellants' books for about 70% to 75% of the State of Rhode Island, including all of the City of Providence. As such wholesale distributor, Silverstein distributes Appellants' books to retailers (R. 16, A. 25; R. 17, A. 9; R. 18, A. 16).

Shortly after the Commission began to function, Silverstein received a notice on the official letterhead of the Commission dated July 19, 1957, reading in part, as follows:

"This agency was established by legislative order in 1956 with the immediate charge to *prevent* the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.

The Commissioners have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths under eighteen years of age.

• • • •

The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age.

The Attorney General will act for us in case of non-compliance.

The Commissioners trust that you will cooperate with this agency in their work. They fully realize the complexity of this problem but believe, in view of the need of strengthening our youths, improving family life and preventing un-social behavior, that the above-named publications are definitely objec-

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tionable under Chapter 610* of the general laws as amended.

Another list will follow shortly.

Thanking you for your anticipated *cooperation*, I am,

Sincerely yours,

ALBERT J. MCALOON
Executive Secretary"

(Pet. Ex. 1; R. 49, 55-56) (Italics supplied.)

Under date of August 5, 1957, Silverstein received another notice from the Commission on its official letterhead reading, in part, as follows:

"The Commissioners by majority vote have declared that the following three magazines are objectionable for sale, distribution or display for youth under 18 years of age.

We appreciate your *cooperation* in regard to the first list. If you have questions regarding the aims or methods of our Commission I suggest that you contact me at the above address.

Looking forward to *continued cooperation*. . . .

(Pet. Ex. 2; R. 20, 57) (Italics supplied.)

Another notice received by Silverstein from the Commission (in 1958) reads as follows:

"The Rhode Island Commission on Youth, unanimously established by the Rhode Island legislature in 1956, is pleased to offer you these enclosures, namely, the law on obscenity, the amendment creating this Commission, and a list of the most recent

* Relating to obscene and objectionable publications, designated as Chapter 11-31 in Resolution No. 95.

publications found objectionable for "sale, distribution or display for youth under 18 years of age".

This list should be used as a guide in judging other similar publications not named.

Your cooperation in removing the listed and other objectionable publications from your newsstands will be appreciated. Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."

(Pet. Ex. 11; R. 23, 76) (Italics supplied.)

Between August 1957 and the commencement of this action in 1960 Silverstein received some 35 other official notices from the Commission, each listing certain publications as having been found objectionable for "sale, distribution or display for youths under 18 years of age," and each notice ending either with "Thanking you for your past cooperation," or "Thank you for your cooperation," or "Thank you for your anticipated cooperation." (Pet. Ex. 3; R. 21, 58; Ex. 4; R. 21, 59; Ex. 5; R. 22, 60; Ex. 6; R. 22, 61; Ex. 7; R. 22, 62; Ex. 8; R. 22, 63; Ex. 10 (11 notices); R. 23, 65; Ex. 12 (11 notices); R. 24, 83-94; Ex. 13; R. 24, 95; Ex. 14; R. 24, 95; Ex. 15 (2 notices); R. 24, 96-97.)

An undated "News Letter" received by Silverstein from the Commission (Pet. Ex. 16; R. 25, 98-102) in or about December 1957 contains the following paragraph (R. 100):

"Your Commission has reviewed 38 publications. They have found by a majority vote 32 to be totally objectionable for youths under 18. The lists have been sent to distributors and police departments. To the present cooperation has been gratifying." (Italics supplied.)

Copies of each Commission notice were sent by the Appellees to the Police Departments of the various cities

and towns in Rhode Island (Pet. Ex. 1; R. 19, 55-56; and R. 38, A. 20).

Promptly after receipt from the Commission of each notice, Silverstein stopped selling the publications distributed by it which were listed on such notice and, in addition, instructed its field men to pick up all unsold copies from its retail customers. The unsold copies were then returned to the publishers (R. 25, A. 23-26). Silverstein took this action "rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply, * * *" (R. 25, A. 27). The testimony further shows that it was for the same reason--the desire to avoid being involved in "any court proceeding" with a "duly authorized organization" which had been "ordered by the State through a resolution"--that Silverstein agreed to "cooperate" with the Commission in its activities (R. 34, A. 66-67).

Shortly after the receipt from the Commission of such notices, Silverstein would be asked by a member of the Providence Police Department for a report of what had been done in connection with the publications listed on such notices. The police officer would ask information as to the number of copies originally received by Silverstein, the number that had been taken back from the retailers and the number that had been returned by Silverstein to the publishers (R. 26, A. 29; R. 26-28, A. 32-39).

In fact, many of the Commission notices contain notations made by Silverstein in pencil, indicating under the word "Draw" the number of copies of a publication received by Silverstein from the publisher and under the word "Ret." the number of copies returned by Silverstein to the publisher (R. 27-28, A. 34-39).

The Commission's Annual Report to the Governor and the General Assembly of Rhode Island dated January 1960 contains the following statements:

"Thirty magazines and paperback pocketbooks were added to the previous list of publications found objectionable for youth under 18 by a majority vote of the Commission. This brings the total to 108.

The guide lists (requested by chiefs of police, distributors and educators in 1957) of the type of publications deemed objectionable for youth under 18 is still sent to all local distributors and chiefs of police in Rhode Island, with the result that in the last six months our newsstands show a very improved condition.

In most cases local distributors have been cooperative this year, withdrawing publications of the type listed in the Commission guide list and returning them to publishers.

This Commission feels that the *guide list*, *Court action initiated by this Commission*, and the cooperation of the Attorney General's Department is largely responsible for the 'new look' on Rhode Island newsstands." (Resp. Ex. A; R. 48, 103-104) (Italics supplied.)

Commission notices list as objectionable the book PEYTON PLACE by Grace Metalious (Pet. Ex. 6; R. 22, 61, Pet. Ex. 11; R. 23, 76 and Pet. Ex. 16; R. 25, 98-101). The paper-bound edition of that book is published by Appellant Dell Publishing Company, Inc. (R. 18, A. 17). Another Commission notice (Pet. Ex. 14; R. 24, 95) lists as objectionable the book THE BRAMBLE BUSH by Charles Mergendahl. The paper-bound edition of that book is published by Appellant Bantam Books, Inc. (R. 18, A. 18).

Summary of Argument

There is no state power to restrict the dissemination of non-obscene books. Accordingly, no state may suppress any book until it has been found to be obscene. Such a determination, involving a constitutional issue, is one that must be made by a Court in accordance with the requirements of due process.

A state statute which empowers a state commission to promulgate to book wholesalers and retailers lists of books deemed by such commission to be obscene, and empowers the commission to recommend to the attorney general of that state the prosecution of persons for the sale of obscene literature, violates the First and Fourteenth Amendments to the Constitution of the United States. Such a statute tends to inhibit the circulation of books without prior judicial determination that such books are obscene.

Rhode Island Resolution No. 73, as amended, is such a statute, for it authorizes the Commission to "educate the public concerning any book * * * containing obscene, indecent or impure language, * * * and to investigate and recommend the prosecution of all violations of said sections, * * *" (i.e. the sections dealing with the sale of obscene material).

The coupling in the statute of the duty to "educate" with the power to "recommend" prosecution constitutes an implicit threat of prosecution if booksellers do not heed the Commission's "education" with respect to any particular book. Accordingly, the statute is unconstitutional on its face.

In addition, the activities of the Appellees under the statute are unconstitutional. The Appellees, by their notices sent to wholesale and retail booksellers in Rhode Island

and to the Chiefs of Police throughout the State, made explicit the implicit threat of prosecution contained in the statute. The inevitable result was the stoppage of sale of the books listed in the Commission notices, without determination by any court that such books are obscene.

ARGUMENT

I

NO STATE MAY RESTRICT THE DISSEMINATION OF BOOKS UNLESS AND UNTIL SUCH BOOKS HAVE BEEN FOUND TO BE OBSCENE BY A COURT IN ACCORDANCE WITH DUE PROCESS.

The dissemination of books is an integral part of freedom of the press and by virtue of the Fourteenth Amendment is safeguarded from invasion by state action (*Smith v. California*, 361 U. S. 147, 149-150 (1959)).

While it is true that under *Roth v. United States*, 354 U. S. 476 (1957), obscene publications are not protected by the First Amendment, it is equally true that there is no "state power to restrict the dissemination of books which are not obscene" (*Smith v. California, supra*, p. 152).

Furthermore, " * * * the question whether a particular work is of that character [i.e., obscene] involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind." *Roth v. United States*, 354 U. S. 476, 497-498 (1957) (Harlan, J., concurring). See also *Feiner v. New York*, 340 U. S. 315, 316 (1951); *Watts v. Indiana*, 338 U. S. 49, 51 (1949); *Norris v. Alabama*, 294 U. S. 587, 589-590 (1935); *People v. Richmond County News*, 9 N. Y. 2d 578, 580 (1961).

Such a "sensitive and delicate" judgment is one that must be made by the courts in accordance with the requirements of due process of law. *Manual Enterprises, Inc. v. Day*, 342 U. S. 431, 8 L. ed. 2d 639, 647 (June 25, 1962); *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, 436 (2d Cir. 1960); *Roth v. United States*, *supra*, pp. 488-489; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-443 (1957).

Mr. Justice Harlan, in announcing the judgment of this Court in *Manual Enterprises, Inc. v. Day*, *supra*, emphasized the foregoing principle in his opinion, joined in by Mr. Justice Stewart, as follows:

"That issue, [i.e., obscenity] involving factual matters entangled in a constitutional claim; see *Grove Press, Inc. v. Christenberry* (CA 2 N. Y.) 276 F. 2d 433, 436, is ultimately one for this Court."

It follows, therefore, that no state possesses the power to suppress or limit the circulation of any book until *there has first been a determination by a court of competent jurisdiction*, in accordance with the requirement of due process, *that such book is obscene* within the definition laid down in *Roth v. United States*, *supra*.

This was well expressed in *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 834 (1953), where the District Court stated:

"Until a court of competent jurisdiction adjudged a work to be obscene * * * there would exist no warrant in law for its suppression."

It further follows that any censorship method devised by a state which results in the suppression or limitation of the circulation of any book prior to such a judicial determination that such book is obscene, violates the con-

stitutional rights of the publisher, the bookseller and the public in general.

In point of fact, wherever any such method of censorship has been devised by any state or state agency, based upon implied threats of criminal prosecution, such method has been struck down by the courts as violating the First Amendment. *Sunshine Book Co. v. McCaffrey*, 4 A. D. 2d 643, 647 (N. Y. 1957); *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292 (1953), modified 14 N. J. 524 (1953); *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (1953); *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 482 (1921); *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903 (1957); *Random House, Inc. v. City of Detroit*, et al., unreported, File No. 555-684, Cir. Ct. Wayne County, Mich. (March 29, 1957 on preliminary injunction; June 16, 1958 on permanent injunction). A copy of the opinion on the preliminary injunction is annexed hereto as Appendix A.

Illustrative of the last cited authorities is *Sunshine Book Co. v. McCaffrey*, *supra*. In that case, the defendant, the License Commissioner of New York City, had issued a letter to all licensed newsdealers threatening to institute proceedings to revoke or suspend the licenses of those dealers who did not discontinue the sale of certain magazines listed in his letter. The basis for the Commissioner's letter was the alleged obscenity of the listed magazines. The plaintiff in that case was the publisher of several of the magazines.

The Appellate Division of the New York Supreme Court reversed the lower court and granted an injunction directing the License Commissioner to recall his letter and to instruct the newsdealers to disregard it. In the course of its opinion the Court said at page 647:

"Even as we would not hesitate to strike down a palpable attempt to violate those guarantees [free-

dom of speech and press], so, by the same token, are we constantly vigilant against any indirect encroachments, however subtle, which result in censorship. Courts have condemned informal methods of censorship which were attempted by threats of criminal prosecution (*Bantam Books v. Melko*, 25 N. J. Super. 292, mod. 14 N. J. 524; *New Amer. Lib. v. Allen*, 114 F. Supp. 823; *Dearborn Pub. Co. v. Fitzgerald*, 271 F. 479, 482)."

"The existing statutes afford means to law enforcement officials for dealing with obscene literature and publications. New methods which meet constitutional standards may be devised in the future by the Legislature. We cannot predict what forms these may take. The human mind is fertile and necessity promotes ingenuity. *But whatever means may be taken to stamp out the pernicious evil of obscenity, they must conform with, and respect, the constitutional guarantees of free speech and freedom of the press.* We cannot countenance encroachments upon those rights by censorship by an administrative official. To permit that would be to inject the unwholesome effects which the uncompromising rule against prior restraint was calculated to prevent." (pp. 648-649) (Italics supplied.)

Chief Justice Warren gave eloquent expression to this principle in his concurring opinion in *Roth v. United States, supra*, where he said at page 495:

"* * * To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of

the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments."

The most recent pronouncement of this basic doctrine was made by Mr. Justice Brennan in his opinion (joined in by Chief Justice Warren and Mr. Justice Douglas) concurring in the reversal in *Manual Enterprises, Inc. v. Day*, *supra*. Mr. Justice Brennan said (8 L. ed. 2d at p. 652):

"We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged. *Marcus v. Search Warrant of Property*, 367 U. S. 717; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436; see also *Smith v. California*; 361 U. S. 147."

II

RESOLUTION NO. 73, AS AMENDED, IS UNCONSTITUTIONAL. BY REASON OF ITS IMPLICIT THREAT OF PROSECUTION, IT HAS THE TENDENCY TO AND, IN FACT, DOES INHIBIT THE DISSEMINATION OF BOOKS IN RHODE ISLAND WITHOUT PRIOR JUDICIAL DETERMINATION THAT THEY ARE OBSCENE.

In violation of the fundamental principles set forth in our Point I, the uncontradicted facts established at the trial clearly show that the effect of the adoption of Resolution No. 73, as amended, and of the acts and practices engaged in by the Commission in purported compliance with its duties under that Resolution has been to suppress the circulation of books in Rhode Island *without any prior judicial determination* as to the obscenity of these books.

Resolution No. 73, as amended, states that it shall be the duty of the Commission "to educate the public con-

cerning any book * * * containing obscene, indecent or impure language, * * * and to investigate and recommend the prosecution of all violations of said sections, * * *

Any such "education" of the public by the Commission concerning any book containing obscene language, whether by advice, information, list, notice or otherwise--by the very language of the Resolution--constitutes an implicit threat that unless there is cessation of sale by booksellers of that book, the booksellers would be prosecuted criminally.

Such threat results from the fact that, pursuant to Resolution No. 73, as amended, the Commission's duty to "educate the public" concerning any "book * * * containing obscene, indecent or impure language" is implemented by the duty to recommend prosecution of the booksellers for alleged violation of Chapter 11-31 of the General Laws of Rhode Island entitled "Obscene and objectionable publications and shows", which, among other things, makes it a criminal offense for any person to import, print, publish, sell, lend, give away, advertise for sale, or distribute any "book * * * containing obscene, indecent or impure language".

Although Justice Mackenzie stated that he felt that it would be better practice for the Supreme Court of Rhode Island, as the highest Court of that State, to pass upon the constitutionality of the Resolution (R. 122), he expressed his own opinion as follows:

"It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal

prosecution, the inevitable result is the suppression of books without a judicial determination as to whether or not they are obscene. *The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island*" (Italics supplied) (R. 120).

We submit that what was said by this Court in *Smith v. California, supra*, with respect to another statute, is here equally applicable. This Court there said at page 154:

"The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

And at page 155:

"It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

Just as in the case of *Smith v. California, supra*, so here, the impending threat of prosecution caused by the Resolution results in booksellers becoming self-censors and thereby impedes the circulation of books even though such books may be within the protection of the First Amendment.

III

THE APPELLEES, BY THEIR ACTS IN SENDING THE NOTICES TO BOOKSELLERS, MADE EXPLICIT THE THREAT OF PROSECUTION IMPLIED IN RESOLUTION NO. 73 AS AMENDED, SUCH ACTS ARE THEREFORE UNCONSTITUTIONAL.

The Commission made explicit the implicit threat of prosecution conveyed by Resolution No. 73, by the notices which it sent to booksellers. Thus, in its notice of July 19, 1957 (Pet. Ex. 1; R. 19, 55-56) the Commission stated:

"The Chiefs of Police have been given the names of the aforementioned magazines with the *order* that they are not to be sold, distributed or displayed to youths under eighteen years of age.

The Attorney General will act for us in case of non-compliance." (Italics supplied.)

In Petitioners' Exhibit 11 (R. 23, 76), an undated notice sent by the Commission in 1958, the following statement appears:

"Cooperative action will *eliminate* the necessity of our recommending prosecution to the Attorney General's department."

With respect to these two exhibits Superior Court Justice Mackenzie aptly commented in his opinion as follows:

"Petitioners' Exhibit '1' also states:

"The Attorney General will act for us in cases of non-compliance."

What can these words possibly mean to the distributor? They can only mean:

'If you fail to comply with this letter by removing from circulation those magazines or books listed herein, you will be prosecuted by the Attorney General.'

This Court can find no other reasonable interpretation of that language.

Language in other notices (d.g. Petitioners' Exhibit '11') carries the same threat in the following language:

" * * * Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department." (R. 118).

In addition, as the numerous exhibits establish, and as was testified upon the trial by Appellee McAloon, copies of the various notices issued by the Commission were sent to the Chiefs of Police throughout Rhode Island. In fact, the witness Kaplan (Silverstein's manager) testified that shortly after the receipt of a notice from the Commission, a request was received from a member of the Providence Police Department for a report as to what Silverstein had done with respect to publications distributed by it listed on such notice (R. 26, A. 32).

Under these circumstances, to contend as Appellees did upon the trial, that the stopping of sale of the publications listed in the Commission's notices was "voluntary" on the part of the distributors, is merely engaging in semantics. Particularly is this so in the light of the testimony of Mr. Kaplan that Silverstein, upon receipt of each notice, stopped selling the publications distributed by it listed on such notice and instructed its field men to recall all unsold copies from retail customers because of Silverstein's desire to avoid "the possibility of some sort of a

court action against ourselves, as well as the people that we supply" (R. 25, A. 23-27).

Justice Mackenzie, in rejecting this defense, made the following comments:

"To say that the action taken by the distributor is voluntary is unrealistic. Here we have notices sent out on letterheads entitled RHODE ISLAND COMMISSION ON YOUTH informing the distributor that this official public agency, established by legislative order in 1956" (Petitioners' Exhibit "1") had made a finding that certain books and magazines being sold and delivered by the distributor were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.

"The Chiefs of Police have been given the names of the aforementioned magazines *with the order that* they are not to be sold. * * * (Petitioners' Exhibit 1) (Italics by the Court).

Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of the various cities and towns. Yet the respondent McAloon would have us believe that the books and magazines were not "banned" by the Commission, and that the distributor's voluntarily cooperated with the Commission. *The effect of the notices sent out by the Commission was clearly intimidation* (R. 117-118). (Italics supplied.)

The Commission's own minutes clearly negate the contention advanced at the trial by Appellee McAloon that the Commission by its activities did not "ban" any books, but rather, that the booksellers' stoppage of sale was a voluntary act.

Thus, the minutes of the Commission's meeting of October 9, 1957 read in part as follows:

"Father Flannery suggested that for the next meeting, Mr. McAloon try to find out what percentage of the books that are given to them are sold from the time they receive them, until the time the police get around."

* * * Father Flannery noted that he had been called about magazines *proscribed* by the Commission remaining on sale after lists had been sent (sic) to distributors and police, to which Mr. McAloon suggested that it could be that the same magazines were seen, but that it probably was not the same edition proscribed by the Commission.

Father Flannery questioned the state-wide compliance by the police, or anyone else, to get the *proscribed magazines off the stands*. Mr. McAloon showed the Commissioners the questionnaires sent to the chiefs of police from this office and returned to us" (Resp. Ex. C; R. 50, f11). (Italics supplied.)

Appellee Flannery's statement as above set forth and particularly the use by him and by Appellee McAloon of the word, "proscribed" is cogent proof how "voluntary" was the booksellers' compliance with the Commission's notices!

The minutes of the Commission's meeting of October 23, 1957 are equally probative and illustrative of the pressure applied by the Commission to effect the stoppage of sale of books listed on its notices. The minutes of that meeting read in part as follows:

"Though *Peyton Place*, authored by Grace Metalious, has been voted objectionable by a majority of the Commission for sale, distribution or display for youths under 18 years of age, the Chairman remarked that a Mr. Horan, Director of the Rhode Island Training School for Boys, had

purchased a copy from the Garden City, Cranston, Rexall Drugstore this date and that the rack was well stocked. *Mr. Sullivan suggested calling the Cranston Chief of Police to inquire the reason Peyton Place was still being sold, distributed and displayed since the Police departments had been advised of the Commission's vote. If no action is taken, the next move would be to talk with the Attorney General's Office.*" (Resp. Ex. B; R. 50, 107) (Italics supplied.)

In reversing Justice Mackenzie the Supreme Court of Rhode Island, in its majority opinion, said,

"We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated."

Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney general. Any unofficial group may do as much in this respect as the commission" (R. 432).

We submit that the rationale of the Rhode Island Supreme Court completely ignores the realities of the situation. Whether or not the Commission has the legal power to order prosecution is not material. What is material, we submit, is that the Resolution itself, conferring upon Appellees, the members of an official state commission, the statutory power to recommend prosecution under the obscenity laws, has the tendency, and, in fact, has had the actual effect, of inhibiting the circulation of books without prior judicial determination that such books are obscene.

The Rhode Island Supreme Court states that a bookseller is free to treat the Commission's Notices "as of no more binding force than similar suggestions of an unofficial group." Why, then, does Resolution No. 73, as amended by Resolution No. 95, contain the specific power to *recommend prosecution*? Does not any citizen, or "unofficial group" have the right to recommend to the prosecuting authorities that a bookseller be prosecuted for violating the obscenity laws without any specific statutory provision? It seems obvious that here the statutory provision was inserted to accomplish the very purpose which it actually did accomplish, viz., to intimidate the booksellers into compliance with the Commission's notices and thereby circumvent the basic principle that by reason of the First Amendment, no book may be suppressed without prior judicial determination that it is obscene.

Nor is there any validity to the Rhode Island's Supreme Court's statement that "Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission" (R. 132) or its further statement; "He was free to disregard their request for cooperation and if he did so he had nothing to fear except prosecution for violating G.L. 1956, chap. 11-31" (R. 134).

A complete answer to this argument was given by the Court in *American Mercury, Inc. v. Chase*, 13 F. 2d 224, 225 (1926), as follows:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Conclusion

We submit that the Rhode Island Legislature, in adopting Resolution No. 73, as amended, and the Appellees, in proceeding as they did under that Resolution, ignored the fundamental precept stated by this Court in *Marcus v. Search Warrant of Property*, 367 U. S. 717 (1961). This Court there said (p. 731):

"It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech."

For, as has been shown above, as a result of the Resolution, and the activities of the Appellees thereunder, Appellants Bantam Books, Inc. and Dell Publishing Company, Inc. have been denied the right to circulate certain books published by them, and all the Appellants are constantly subject to the threat of being deprived of their right to circulate books in Rhode Island, and booksellers of their right to sell such books. In addition, the public

of Rhode Island has been deprived of the right to read certain books and, so long as Resolution No. 73 remains in effect, is constantly subject to deprivation of the freedom to read. Such deprivation has been accomplished and is threatened to be accomplished without any prior judicial determination that the books involved are obscene. Rather the determination takes the form of a pre-judgment by the Appellees—in most cases by a majority—based upon unknown standards.

For the reasons above set forth, it is urged that

- (a) Resolution No. 73 of the Acts and Resolves of 1956 of the Rhode Island General Assembly, as amended by Resolution No. 95 of the Acts and Resolves of 1959 should be declared unconstitutional.
- (b) The judgment of the Superior Court of Rhode Island entered on January 18, 1962 should be reversed and Orders Nos. 2 and 3 of the judgment of that Court entered on March 2, 1961 should be reinstated;

Respectfully submitted,

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APPENDIX A**STATE OF MICHIGAN****IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE****IN CHANCERY****No. 555 684**

RANDOM HOUSE, Inc., a New York corporation,*Plaintiff,**v.s.***CITY OF DETROIT, a Municipal corporation, CITY OF DETROIT
METROPOLITAN POLICE DEPARTMENT, EDWARD S. PIGGINS and
MELVILLE E. BULLACH,***Defendants.*

OPINION

This action is brought by plaintiff for a permanent injunction: (1) directing defendants to withdraw the ban against the sale in Detroit of the hard-bound edition of the book *TEX NOIGRN FREDERICK*; (2) enjoining defendants, their agents and subordinates, from directly or indirectly ordering any person engaged in the sale of the book to discontinue sale thereof, and from making any threat of prosecution, explicit or implicit, to any person selling the book by reason of their sale, distribution or display for sale thereof; the aforesaid relief, however, not to impose any restraint upon defendants' lawful duties of law enforcement by prosecution.

The matter is before the Court on an application for a preliminary injunction.

Appendix A.

There is no dispute as to the facts. Plaintiff, a New York corporation, in 1955 published the hard-bound edition of the book **TEX NORTH FREDERICK**. The book was awarded the National Book Award as being the outstanding novel of 1955 and was on the national best-seller lists for 32 weeks. Plaintiff has sold in excess of 100,000 copies of the book throughout the United States.

Defendant Piggins is the Chief of Police of the City of Detroit, and defendant Bullach is an Inspector and Head of the Censor Bureau of said Police Department. In or about the middle of January, 1957 defendant Piggins made a public announcement to the effect that the book **TEX NORTH FREDERICK** was obscene and thereafter defendant Bullach notified booksellers in the City of Detroit that the sale of the book would lead to arrest and prosecution. Since then the book has not been sold by booksellers in the City of Detroit.

Plaintiff contends that the foregoing acts on the part of defendants Piggins and Bullach were in excess of the authority conferred upon them by law and constituted an illegal banning and suppression of the book **TEX NORTH FREDERICK**, as a result of which plaintiff has been irreparably injured in violation of its constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. Defendants, on the other hand, contend that they acted within the statutory powers conferred upon them by the Michigan state statute and the Detroit municipal ordinance, both prohibiting the sale of obscene publications.

This Court is constrained to disagree with the defendants' position. We are here dealing with the precious constitutional right of a free press.

Appendix A

"Freedom of the press is not limited to freedom to publish, but includes the liberty to circulate publications, which the Supreme Court has said 'is as essential to that freedom as liberty of publishing.' Lovell v. City of Griffin, 303 U. S. 444; 58 S. Ct. 666, 669, 82 L. Ed. 949. In the Lovell case the court again stressed the importance of protecting freedom of the press 'from every sort of infringement'. See also Near v. State of Minnesota, 283 U. S. 697, 61 S. Ct. 625, 75 L. Ed. 233, 56 S. Ct. 444, 80 L. Ed. 660; De Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255, 84 L. Ed. 278. Freedom of the press, together with freedom of speech and freedom of religion, occupy a 'preferred position' among our constitutional guarantees. Marsh v. State of Alabama, 1946, 326 U. S. 501, 509, 66 S. Ct. 276, 90 L. Ed. 265; Jones v. City of Opelika, 1943, 319 F. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290; Murdock v. Com. of Pennsylvania, 1943, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292; Martin v. City of Struthers, 1943, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313. That preferred position gives these guarantees 'a sanctity and a sanction not permitting dubious intrusions.' Thomas v. Collins, 323 U. S. 516, at page 530, 65 S. Ct. 315, 89 L. Ed. 430 * * *. Censorship in any form is an assault upon freedom of the press. A censorship that suppresses books in circulation is an infringement of that freedom." (*New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823, 832, 833; U. S. Dist. Ct., N.D. Ohio, E. D. 1953.)

Neither the Michigan statute nor the Detroit municipal ordinance, under which defendants have claimed to act, clothed defendant Piggins, as Police Chief of the City of Detroit, or defendant Bullach, as Head of the Censor Bureau, with power to censor or ban the sale of any books.

Appendix A

The sole authority granted to defendants Piggins and Bullach under the Michigan statute or the Detroit ordinance is to order the arrest of any person selling a book where there is probable cause that such sale violates the obscenity laws. In the event of such an arrest, it would then devolve upon a court of competent jurisdiction to determine whether or not the book violates the obscenity statute or ordinance, thus guaranteeing a judicial determination in accordance with the constitutional requirements of due process. If, after such a judicial determination, the book were found to be obscene, a legal ban on its sale would then ensue. Here, however, defendants Piggins and Bullach have circumvented the judicial process and have effected such ban upon the sale of the book by their non-judicial determination that the book is obscene, their announcement of the fact, and their notifying booksellers that the sale of the book would lead to prosecution. Such conduct on the part of said defendants is beyond the scope of their lawful authority and violates plaintiff's constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States.

In a similar situation (*New American Library v. Allen, supra*, pp. 833, 834) the United States District Court of Ohio issued an injunction against the Police Chief of the City of Youngstown. The Court there said:

"The defendant was without authority to censor books. Such a drastic power can be vested in a police officer only by a valid express legislative grant. As Chief of Police it was defendant's duty to examine the suspected publications to determine whether there was probable cause for prosecution. He was without authority to determine with finality

Appendix A

whether the books were obscene or immoral in violation of the ordinance. In the event prosecutions were undertaken, the burden would rest upon the city officials to establish by proof beyond a reasonable doubt every element of the offense, including the obscene or immoral nature of the books. Until a court of competent jurisdiction adjudged a book to be obscene or immoral, there would exist no warrant in law for its suppression."

In *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479, Federal Judge Westenhaver issued an injunction against the Mayor and Chief of Police of Cleveland who were acting under color of an ordinance proscribing the sale of obscene and scandalous literature. Judge Westenhaver there said (p. 482):

"The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene or scandalous; but, if it were, the limit of the city's power would be to conduct the prosecution for the specific offense thus committed, * * *."

See, also, *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292, 96 A.2d 47, mod. on other grounds 14 N. J. 524, 103 A.2d 256.

Nor can defendants Piggins or Bullach successfully argue that their conduct did not constitute a banning of the book. The fact remains that after these defendants made their announcement that the book is obscene and notified booksellers that its sale would subject a seller to prosecution, booksellers in Detroit stopped selling the book. To say that such stoppage of sale, in the light of defendants' announcement and notification, was a voluntary act on the part of booksellers is to fly in the face of realism.

Appendix A

Like arguments have been struck down by the courts. In *Bantam Books, Inc. v. Melko, supra*, the Court said:

"Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive . . . True, as the prosecutor says by way of defense, there was no actual compulsion or threat, in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received."

Similarly, in *American Mercury, Inc. v. Chase*, 137 F. 2d 224, 225, the Court said:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Defendants have urged as an additional defense to this motion that the book TEN NORTH FREDERICK is obscene. The question of the obscenity or non-obscenity of the book

Appendix A

is not involved in this case. Plaintiff's right to an injunction does not depend upon the contents of the book. Plaintiff's right stems from the fact that these defendants have illegally banned the sale of plaintiff's book by exercising powers beyond those delegated to them by the statute and ordinance under which they acted.

* It is fundamental that equity will intervene to prevent an official from transcending his power where, in so doing, he causes or threatens to cause irreparable injury to property or civil rights.

This principle was forcibly expressed by Federal Judge McNamee in *New American Library v. Allen*, 114 F. Supp. 823, 831 (U. S. Dist. Ct., N. D. Ohio, E. D. 1953), as follows:

"Where public officers, charged with the enforcement of a valid criminal law exceed their lawful powers and by arbitrary action cause or threaten to cause irreparable injury to property rights or civil rights of the complainant, equity will intervene." 28 Am. Jr. 373, See, 185; id. 421, See, 238; 43 C.J.S., Injunctions, See, 111, p. 634."

See also:

Wetherby v. City of Jackson, 264 Mich. 146, 249 N. W. 484, 485.

Grosse Pointe Fire Fighters Ass'n v. Village of Grosse Pointe Park, 303 Mich. 405, 6 N. W. 2d 725, 727.

Bantam Books, Inc. v. Melko, 25 N. J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N. J. 524, 102 A. 2d 256.

Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479.

Appendix A

Plaintiff has been deprived of a property right without due process of law. It has suffered loss incapable of accurate measurement in an action at law. Accordingly, plaintiff has sustained irreparable injury and is threatened with further loss.

For the reasons above set forth, the Court holds that the conduct of defendants Piggins and Bullach in ordering the suppression of plaintiff's book under threat of arrest and prosecution of the booksellers was in excess of their lawful powers under the Michigan statute and the Detroit ordinance. An order may be entered herein restraining the defendants, pending the trial of this action, from engaging in such unauthorized conduct. No restraint, however, is imposed upon defendants' power to enforce the statute of the State of Michigan or the ordinance of the City of Detroit by prosecution.

s/ CARL M. WEIDEMAN

Circuit Judge

Mar. 29, 1957

A True Copy

EDGAR M. BRANIGAN

Clerk

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC.; DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC.

Appellants.

v.

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD M. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

APPELLEES' BRIEF

Opinions Below

The opinion of the Supreme Court of Rhode Island is reported in 176 Atlantic Reporter, Second Series 393. It is also contained in the transcript of record beginning at page 130

Jurisdiction

Title 28, United States Code, Section 1257 (2) confers jurisdiction upon this Court in appropriate cases. The appellants assert that in this case jurisdiction is conferred by 28 United States Code 1257 (2). The decision of the Supreme Court of Rhode Island is in favor of the validity of the statute appellants draw in question.

Statutes Involved

Article XII of the Constitution of Rhode Island provides as follows:

"SECTION 1. The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education.

* * * * *

The General Assembly of Rhode Island created the Rhode Island Commission to encourage Morality in Youth at the January session, 1956 by Resolution No. 73 (page 8 of the transcript of record). The Resolution was amended May 25, 1959 Rhode Island Act and Resolves, January session, 1959 page 880:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad printed paper or other thing containing obscene, indecent or impure language, as defined in Chapter 11-31 of the general laws, entitled 'obscene and objectionable publications and shows' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to

undesirable behavior of juveniles, (b) educate the public as to these causes; and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes."

Questions Presented

1. Does the General Assembly of Rhode Island have the authority and right to create an educational agency or commission to educate the public concerning obscene publications and the causes of juvenile delinquency?
2. Is the Resolution creating the Rhode Island Commission to Encourage Morality in Youth a valid exercise of the authority and right of the Rhode Island General Assembly to create such an educational agency?
3. Did the Rhode Island Commission to Encourage Morality in Youth validly exercise the authority and power vested in it?

The Facts

The facts contained in the transcript of record and as stated in appellants brief are substantially correct. The inference, however, to be drawn from the facts recited could be augmented slightly to favor the appellees without doing violence to candor or truth.

It is submitted that the only evidence in the record of this cause shows the books involved are "objectionable for sale, distribution or display for youth under 18 years of age." That is the declaration or statement in each of the exhibits introduced by the petitioners-appellants in the Superior Court. A very reasonable inference to be drawn from the "Silverstein" withdrawal of the books "rather than face the possibility of some sort of a court action against ourselves as well as the people that we supply" is that "Silverstein" realized the books were objectionable and could be subject to "some sort of a court action."

ARGUMENT

DOES THE GENERAL ASSEMBLY OF RHODE ISLAND HAVE THE AUTHORITY AND RIGHT TO CREATE AN EDUCATIONAL AGENCY OR COMMISSION TO EDUCATE THE PUBLIC CONCERNING OBSCENE PUBLICATIONS AND THE CAUSES OF JUVENILE DELINQUENCY?

The people of Rhode Island in the State Constitution charged and empowered the General Assembly "to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education." *Rhode Island Constitution*, Article XII, Section 1.

Education worthy of the name must restrict vice and the dissemination of the obscene. The compilation of lists of required texts and readings by any educational agency and the exclusion of other texts and books—or the listing of objectionable books—would restrict the dissemination of the petitioners books.

There has never been objection to such restriction until the appellants sweeping assertion:

"It follows, therefore, that no state possesses the power to suppress or limit the circulation of any book until there has first been a determination by a court of competent jurisdiction, in accordance with the requirement of due process, that such book is obscene within the definition laid down in *Roth v. United States, supra.*"

(Appellants brief, page 15)

"It follows further that any censorship method devised by a state which results in the suppression or limitation of the circulation of any book prior to such a judicial determination that such book is obscene, violates the constitutional rights of the publisher, the bookseller and the public in general."

(Appellants brief, page 15)

The appellants claim too much. In the current state of the record, the appellants contention amounts to unrestricted license to disseminate obscene as well as non-obscene books.

Obscene publications are not protected by the First Amendment.

Roth v. United States, 354 United States 476

As far as the record shows, to say that the appellants books are not obscene is gratuitous assertion.

In the case upon which appellants rely—*Bantam Books v. Melko*, 25 New Jersey Super. 292, Mod. 14 New Jersey 524, it may be noted the New Jersey Supreme Court mentioned that the Superior Court found the book there in question not to be obscene.

II

IS THE RESOLUTION CREATING THE RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH A VALID EXERCISE OF THE AUTHORITY AND RIGHT OF THE RHODE ISLAND GENERAL ASSEMBLY TO CREATE SUCH AN EDUCATIONAL AGENCY?

Reading the Resolution should suffice to disclose justification of the action of the General Assembly.

The Rhode Island Supreme Court in *Bantam Books, Inc. v. Sullivan*, 176 A. 2d 393 at 395 said:

"We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educational and investigative in aid of the legislative policy, to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully order anyone to com-

ply with its conclusions regarding the objectionable nature of a publication which it has officially investigated."

There may be other or better ways of saying the same thing but the Rhode Island Supreme Court clearly and correctly stated the basis for holding the resolution constitutional.

III

DID THE RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH VALIDLY EXERCISE THE AUTHORITY AND RIGHT VESTED IN IT?

The holding and the basis for the holding in the opinion of the Rhode Island Supreme Court in the *Bantam Books, Inc. v. Sullivan, supra*, amply support the legality of the Commission's actions. The Court said at page 398:

"It is the social interest in order and morality that the legislature by enacting resolution No. 73 is seeking to subserve. And the acts of the Commission thereunder were in our opinion a reasonable and lawful implementation of the resolution."

Conclusion

The appeal should be denied and dismissed and the decree appealed from affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States
OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC.,
POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC.,

Appellants,

v.

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

APPELLANTS' REPLY BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC., DIA Publishing Company, Inc.,
Pocket Books, Inc., and The New American Library of
World Literature, Inc.,

Appellants.

Joseph A. Sullivan, Abraham Chinitz, Edward H. Flan-
nery, Howard C. Olsen, David Coughlin, Joseph Leon-
ard, Omer A. Sutherland, Dr. Charles Goodman and
Eustace T. Pekkas, in their capacities as Members of the
Rhode Island Commission to Encourage Morality in
Youth and Alpheus McAlonan, in his capacity as Executive
Secretary of the Rhode Island Commission to Encourage
Morality in Youth.

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

APPELLANTS' REPLY BRIEF

Although Appellees contend that the facts thus stated in appellants' brief are "substantially correct" (p. 2), they do not discuss any of the authorities cited by us or attempt to distinguish them from the instant situation, except that they document *Roth v. United States* and *Bantam Books, Inc. v. Melby*.

As to the reference by Appellees to *Roth v. United States* that obscene publications are not protected by the First Amendment, of course, we agree and at page 14 of

our main brief, we cited the *Roth* case of that very proposition. But, we submit, that principle merely leads to the doctrine that non-obscene publications do have such protection, and that, therefore, legislation must be carefully scrutinized so that, as stated in *Roth*, "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest ~~exactly~~ necessary to prevent encroachment upon more important interests" (p. 488).

With respect to *Bantam Books, Inc. v. Miller*, Appellees refer to the fact that "the New Jersey Supreme Court mentioned that the Superior Court found the book there in question not to be obscene" (p. 50). Actually, as the record in that case shows, this was not a finding but a *dictum* by the Superior Court, for the issue there, as here, did not involve the obscenity or non-obscenity of the books. Actually, the book was not even in evidence.

As to Article XII of the Rhode Island Constitution

The issues here presented do not involve Article XII of the Constitution of Rhode Island as asserted by Appellees at page 2 of their brief. We submit, however, that its purposes "The diffusion of knowledge" and securing to the people "the advantages and opportunities of education" are thwarted by Resolution 73, as intended. That Resolution and the activities of the Appellees thereunder, by inhibiting the circulation of books without prior judicial determination that they are obscene, function in direct antithesis to the stated purposes of the Article.

As to the Inference Sought to be Drawn by Appellees

At page 3 of their brief Appellees admit that there has been limitation of circulation of books in Rhode Island since the Resolution went into effect, for they say "The facts contained in the transcript of record and as stated in appellants brief are substantially correct".

However, Appellees ask that "an inference" be drawn that Silverstein's withdrawal of the books from circulation, after receipt of the Commission's notices, was because Silverstein "realized the books were objectionable", that is, but another way of stating that Silverstein's withdrawal of the books was "voluntary". The basic difficulty with Appellees' position is that such inference would be contrary to the uncontradicted testimony (p. 11 of main brief and R. 33, A. 64); contrary to the threats of prosecution used by the Commission in its notices to booksellers; and the Commission's system of issuing questionnaires to the Police Chiefs to ascertain if they had followed up any list, if they had met any cooperation, or any negative action" (R. 45, A. 50-51); and contrary to statements at a Commission meeting by Father Flannery, a Commission member, and Mr. McAloon, the Commission's Executive Secretary, referring to publications as having been *proscribed* by the Commission (R. 111).

As to Alleged Proof of Obscenity of the Listed Publications

At page 3 of their brief, Appellees make the further statement "that the only evidence in the record of this cause shows the books involved are 'objectionable for sale, distribution or display for youth under 18 years of age'".

There is not a shred of evidence to support this statement. However, we do not dispute, as stated by Appellees, that such "is the declaration or statement in each of the exhibits introduced by the petitioners-appellants in the Superior Court." But such *ex parte* findings, by the members of an administrative agency, or most cases by a majority, based upon unknown standards, may not be used as a substitute for a court determination made after a trial in accordance with the requirements of due process.

As to the Obscenity or Non-Obscenity of Appellants' Books

At page 5 of their brief, Appellees make the statement: "As far as the record shows, to say that the appellants' books are not obscene is gratuitous assertion." We have never attempted to deal with the question of obscenity or non-obscenity of Appellants' books. The issues here involved do not include any such question. The issues, simply stated, are, do the Resolution and the activities of Appellees thereunder, violate freedom of the press, by tending to suppress or limit the circulation of books *without prior judicial determination* that they are obscene?

As to Appellees' Claim of Unrestricted License

At page 5 of their brief, Appellees make the further statement: "In the current state of the record, the appellants' contention amounts to unrestricted license to disseminate obscene as well as non-obscene books."

This same unwarranted accusation was made by Appellees in the Superior Court of Rhode Island. Justice Mackenzie summarily disposed of that argument with the following statement:

"Contrary to the contention of the respondents in their brief, the petitioners here are not seeking an injunction so as to furnish them with 'unlimited license to publish and distribute obscene publications in this State'. The petitioners desire freedom to publish, as guaranteed to them by the above cited sections of the constitutions of the United States and Rhode Island, knowing full well the consequences of their acts if they violate the criminal laws by the publication of obscene books and periodicals." (R*119-120)

Conclusion

For the reasons set forth in our main brief and in this reply brief, it is urged that:

- (a) Resolution No. 73 of the Acts and Resolves of 1956 of the Rhode Island General Assembly, as amended by Resolution No. 95 of the Acts and Resolves of 1957, should be declared unconstitutional.
- (b) The judgment of the Superior Court of Rhode Island entered on January 18, 1962 should be reversed and Orders Nos. 2 and 3 of the judgment of that Court entered on March 2, 1961 should be reinstated.

Respectfully submitted,

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